(25,371)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 541.

WELLSVILLE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

MARTHA MILLER, *NÉE* EVERETT, AND ALPHA OIL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1916.

a In obedience to the commands of the within Writ I herewith transmit a duly certified transcript of the record and all proceedings in this court in cases numbered 3785 and 7117, and entitled Wellsville Oil Company, Plaintiff in error, vs. Martha Miller et al., Defendants in error.

In witness whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, Oklahoma, this 13 day of June, 1916.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk, Supreme Court, Oklahoma.

1 Filed Jun- 13, 1916. William M. Franklin, Clerk.

Citation.

In the Supreme Court of the United States.

No. —.

THE WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER, née Everett, and THE ALPHA OIL COMPANY, a Corporation, Defendants in Error.

The President of the United States to Martha Miller, née Everett, and The Alpha Oil Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, District of Columbia, within thirty (30) days from the date herein, pursuant to a writ of error filed in the Supreme Court of the State of Oklahoma, wherein the Wellsville Oil Company, a corporation, is plaintiff in error, and you, Martha Miller, née Everett, and the Alpha Oil Company, a corporation, are defendants in error, to show cause if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done the parties in this behalf.

2 Witness, the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, this 31st day of May, 1916.

[Seal Supreme Court, State of Oklahoma.]

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

Attest:
WM. M. FRANKLIN,
Clerk of the Supreme Court of Oklahoma.

Service of the within citation is hereby accepted as tho- served by an officer of the Court and without waiving any rights to object to jurisdiction of the Court, and this service shall be binding only so far as service by *an* Robt. J. Boone officer of the Court would be Att'y for Alpha Oil Co.

Service of the within citation is hereby accepted as though served by an officer of the court and without waiving any rights, to object to jurisdiction of the court and this service shall be binding only so far as service by an officer of the court would be.

TILLOTSON & ELLIOTT,
By JOS. TILLOTSON,
Att'ys for Martha Miller née Everett.

3 Filed May 31, 1916. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

THE WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER et al., Defendants in Error.

Application for Enlargement of Time to Return Writ of Error.

Comes now the above named plaintiff in error and shows to the court that it has been impossible to complete the transcript of the record in the above cause and make the return to the writ within the time heretofore allowed, and requests that an extension of thirty days be allowed in which to make the return to the writ of error.

J. P. O'MEARA,
Attorney for Plaintiff in Error.

Upon the above application the time for the return to the writ of error to the United States Supreme Court is hereby enlarged and extended thirty days additional to the time specified in said writ.

Dated this 31st day of May, 1916.

[Seal Supreme Court, State of Oklahoma.]

M. J. KANE,
Chief Justice, Supreme Court of Oklahoma.

Filed May 31, 1916. William M. Franklin, Clerk.

4 Filed Sep. 14, 1915. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 3785.

THE WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants in Error.

Petition for Writ of Error, Assignment, and Prayer.

To the Supreme Court of the State of Oklahoma:

Wellsville Oil Company, a corporation, plaintiff in error, considering itself aggrieved by the final decision of the Supreme Court of Oklahoma, in rendering judgments against it in the above styled cause, on December 22, 1914, and on June 22, 1915, said plaintiff in error prays a writ of error from said decisions and judgments to the United States Supreme Court, and an order fixing the amount of the supersedeas bond to stay the enforcement of said judgments and decisions.

The plaintiff in error, Wellsville Oil Company, says that the amount in controversy on this appeal exceeds in value the sum and amount of Five Thousand Dollars ($5000), exclusive of in-
5 terest and costs.

And the said Wellsville Oil Company, a corporation, plaintiff in error, assigns the following errors in the record, proceedings and decisions in said cause:

That on the seventh day of June, 1907, an order was made in the United States Court for the Northern District of the Indian Territory, said Court being a court of general jurisdiction, having jurisdiction of the subject matter and of the parties to said action, in which Martha Miller nee Everett, by herself and her guardian, Calvin Everett, was plaintiff, and Wellsville Oil Company was defendant, said guardian was authorized and ordered to make a lease on certain lands of his ward, in favor of the Wellsville Oil Company, and the Wellsville Oil Company was required to pay a certain bonus therefor, and that in said proceeding in said United States Court for the Northern District of the Indian Territory, said guardian did, on the 24th day of July, 1907, report to said Court that he had made said lease in all respects in conformity to the order of court, and said lease so made by said guardian was, on said date, approved and confirmed by the Court, and that said judgment of said United States Court for the Northern District of the Indian Territory was never vacated, modified or appealed from, and remained and continued in full force and effect.

That afterwards the said Martha Miller née Everett, disregarding the lease made by her through her guardian and under the

order of the United States Court for the Northern District of the Indian Territory, and approved by said Court, signed, executed and delivered another lease, to the Alpha Oil Company, ignoring
6 the lease theretofore made to this plaintiff in error, and that this plaintiff in error then filed its petition in the District Court for Rogers County, Oklahoma, seeking to enforce the terms of the lease theretofore made in the United States Court for the Northern District of the Indian Territory, and seeking relief against the recorded lease to the defendant in error, Alpha Oil Company. Plaintiff in error further states that a demurrer was sustained to the plaintiff's petition, and plaintiff in error appealed from the decision and judgment of the District Court of Rogers County, Oklahoma, to the Supreme Court of Oklahoma, said Supreme Court of Oklahoma being the highest court in the State of Oklahoma and exercising general common law and equity jurisdiction, and that on the 22nd day of December, 1914, the Supreme Court of Oklahoma affirmed the decision of the District Court of Rogers County, Oklahoma, and that afterwards, to-wit, on the 8th day of January, 1915, the District Court of Rogers County, Oklahoma, ordered the custodian of certain funds, of which the plaintiff in error was the owner, to be paid to the defendants in error, although the defendants in error had at no time, by any pleading in said court, set up or asserted any title whatsoever to said funds.

Plaintiff in error further states that immediately after the rendition of this judgment disbursing said funds, it appealed again to the Supreme Court of Oklahoma, and afterwards, on the 22nd day of June, 1915, the Supreme Court of Oklahoma dismissed its appeal.

It further says that the judgments rendered against it in the Supreme Court of Oklahoma have become final and that it is
7 without relief, except by appeal to the Supreme Court of the United States.

The particular errors of which the plaintiff in error complains, which were committed against it by the two decisions of the Supreme Court of Oklahoma, are as follows:

First. That the Supreme Court of Oklahoma, in each of the instances above referred to, failed and refused to give full faith or credit, or any efficacy whatsoever, to the decision of the United States Court for the Northern District of the Indian Territory, but undertook to affirm the decision of the District Court of Rogers County, Oklahoma, and undertook to re-try and re-examine all matters and things that had been tried, examined and determined finally by the United States Court, for the Northern District of the Indian Territory; that in these decisions, referred to, there was drawn into question the validity of the statutes of the United States of America, conferring jurisdiction on the United States Court for the Northern District of the Indian Territory; there was drawn into question the authority exercised by said Court under the Acts of Congress creating it, and the decision of the Supreme Court of Oklahoma was against the validity of the actions of the United States Court for the Northern District of the Indian Territory. That the plaintiff's title, right, privilege and immunity was claimed under the Constitution of the

United States and under statutes of Congress, creating said United States Court for the Northern District of the Indian Territory, and the decision of the Supreme Court of Oklahoma in each instance was against the title, right, privilege and immunities claimed by this plaintiff in error, arising under said Constitution and laws of the United States.

Second. It further says that by said decisions of the Supreme Court of the State of Oklahoma, it was determined that the judgment of said United States Court for the Northern District of the Indian Territory was dependent for its efficacy in making said lease, upon an approval of said lease by the Secretary of the Interior, and that under the Acts of Congress in reference to the leasing of Indian lands in the Indian Territory, the Secretary of the Interior was not required to, and had at said time no authority to approve said lease made under the order of the court, as aforesaid,, and that power was conferred upon the United States Court for the Northern Dis-
8 trict of the Indian Territory to authorize and approve said leases and make same effective, without the consent or approval of the Secretary of the Interior, and that the decisions of the Supreme Court of Oklahoma are adverse to the right of the plaintiff in error, and that said rights were based upon statutes of the United States authorizing the making of oil and gas mining leases on certain Indian lands, in the manner in which the lease in controversy was made.

Third. Plaintiff in error further states that by the said decisions of the Supreme Court of Oklahoma, hereinbefore referred to, it has been deprived of its property without process of law, and that it has been denied the equal protection of the laws, and that its contract of lease, made in the manner provided by the Acts of Congress and approved by the United States Court for the Northern District of the Indian Territory, in the manner provided by the Acts of Congress, has been forfeited and destroyed.

Fourth. It further says that this is a case in which a title and right claimed under an authority exercised under the United States was asserted and that the Supreme Court of the State of Oklahoma denied this right and title so asserted, and refused to give effect to the decision of the United States Court for the Northern District of the Indian Territory, which established said right, in this complainant.

For all of which errors the plaintiff in error, Wellaville Oil Company, prays that said judgments of the Supreme Court of Oklahoma dated December 22, 1914, and June 22, 1915, be reversed, and a judgment rendered in favor of the plaintiff in error, and for costs.

JAMES A. VEASEY,
L. A. ROWLAND,
J. P. O'MEARA,
Solicitors for Plaintiff in Error, Wellaville Oil Company.

9 Filed Sep. 14, 1915. William M. Franklin, Clerk.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let writ of error issue upon the execution of a bond by Wellsville Oil Company in the sum of Ten Thousand and no/100 Dollars, such bond, when approved by the Clerk of this Court, to act as a supersedeas.

Dated this 14th day of September, 1915.

J. F. SHARP,
Acting and Vice-Chief Justice, the Honorable Matthew J. Kane, Chief Justice, Being at Present Absent from the State.

STATE OF OKLAHOMA,
Supreme Court, ss:

I, William M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, certify that the Honorable Matthew J. Kane is Chief Justice of the Supreme Court of Oklahoma and that the Honorable J. F. Sharp is the regular appointed and acting Vice Chief Justice of said Court, and that the honorable Matthew J. Kane, Chief Justice, is at present absent from the State, and that said Vice Chief Justice is acting as Chief Justice during such absence.

[Seal Supreme Court, State of Oklahoma.]

W. M. FRANKLIN,
Clerk of the Supreme Court,
By NEAL ORR, *Ass't.*

10 In the Supreme Court of the State of Oklahoma.

No. 3785.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants in Error.

Bond on Writ of Error from the Supreme Court of Oklahoma to the Supreme Court of the United States.

Know All Men by These Presents:

That we, Wellsville Oil Company, a corporation, as principal and J. H. McEwen and G. T. Braden, as sureties, are firmly bound unto the defendants in error, Martha Miller, nee Everett and Alpha Oil Company, a corporation, in the sum of Ten Thousand Dollars ($10,000.00) to be paid the said obligees, their successors, representatives and assigns; to the payment of which well and truly to be made we

bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of December, A. D. 1915.

Whereas, the above named plaintiff in error hath prosecuted a writ of error to the Supreme Court of the United States to reverse certain judgments rendered in the above styled action by the Supreme Court of Oklahoma,

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be null and void; otherwise
11 to remain in full force and effect.

WELLSVILLE OIL CO.,
By J. H. McEWEN, *Pres.*,
Principal.
J. H. McEWEN,
G. T. BRADEN,
Sureties.

STATE OF OKLAHOMA,
County of Tulsa, ss:

J. H. McEwen, being duly sworn, says he has property in the State of Oklahoma, over and above his liabilities exceeding in value the sum of Ten Thousand Dollars.

J. H. McEWEN.

Subscribed and sworn to by J. H. McEwen, this 6 day of December, 1915.

[SEAL.] F. M. GROVE,
Notary Public.

My commission expires Feb'y 28, 1918.

STATE OF OKLAHOMA,
County of Tulsa, ss:

G. T. Braden, being duly sworn says he has property in the State of Oklahoma over and above his liabilities and exemptions, exceeding in value the sum of Ten Thousand Dollars.

G. T. BRADEN.

Subscribed and sworn to by G. T. Braden this 9th day of December, 1915.

[SEAL.] F. M. GROVE,
Notary Public.

My commission expires Feb'y 28, 1918.

Approved this 10th day of Dec. 1915.

[SEAL.] WM. M. FRANKLIN, *Clerk.*

Approved this 10 day of December, 1915.

MATTHEW J. KANE,
Chief Justice Sup. Ct.

Filed Dec. 10, 1915, William M. Franklin, Clerk.

12 Filed Mar. 25, 1916. William M. Franklin, Clerk.

In the Supreme Court of the United States of America.

Nos. 3785, 7117.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER (née Everett) and ALPHA OIL COMPANY, a Corporation, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of Oklahoma.

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because of the record and proceedings, as also in the rendition of the judgments of a plea which is in said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court at law or in equity in said State in which a decision could be had in the causes of Wellsville Oil Company, a corporation, Plaintiff in Error, versus Martha Miller (nee Everett) and Alpha Oil Company, a corporation, Defendants in Error, being numbers 3785 and 7117, both proceedings and judgments being in the same cause, wherein was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege, and exemption specially set up and claimed under said clause of said statute, and manifest error hath happened, to the grave damage of Wellsville Oil Company, a corporation, as — its complaint
13 appears, we be willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first day of June, 1916, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of said Supreme Court, the 24th day of March, A. D. 1916.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk United States — Court, Western District of Oklahoma.

Allowed by:
MATTHEW J. KANE,
Chief Justice, Supreme Court of Oklahoma.

14 Filed Apr. 6, 1912. W. H. L. Campbell, Clerk.

Petition in Error.

In the Supreme Court of the State of Oklahoma.

No. 3785.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants in Error.

The Wellsville Oil Company, plaintiff in error, alleges and shows to the court that on the 5th day of December, 1911, the said defendants in error, Martha Miller, née Everett, and the Alpha Oil Company, a corporation, obtained a judgment in the District Court for Rogers County, Oklahoma, by the consideration of said court, sustaining defendant's demurrers to plaintiff's petition, dismissing plaintiff's action and entering judgment for the defendants in a certain action then pending in said District Court, wherein said Wellsville Oil Company, plaintiff in error, was plaintiff, and the said Martha Miller, née Everett, and Alpha Oil Company, a corporation, defendants in error, were defendants.

An original case-made, duly certified and attested, of the pleadings and proceedings and said judgment in said action, in said District Court, is hereunto attached and made a part of this petition in error.

15 The Wellsville Oil Company, plaintiff in error, alleges that there is error in said proceedings and judgment, and assigns error thereto, as follows:

I.

The court erred in rendering judgment for defendants and against the plaintiff.

II.

The court erred in sustaining defendant's demurrers.

III.

The court erred in dismissing plaintiff's action.

IV.

The court erred in refusing to overrule defendant's demurrers.

V.

The decision is contrary to law.

Wherefore, the Wellsville Oil Company, plaintiff in error, prays that the said judgment be reversed and set aside by this court.

VEASEY & ROWLAND,
L. G. OWEN,
Attorneys for Plaintiff in Error.

16 In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Case-Made.

District *Clerk*, Claremore, Rogers County, State of Oklahoma. Filed Mar. 6, 1912.

LEE SETTLE
District Clerk,
By —— ——, *Deputy.*

Filed Apr. 6, 1912. W. H. L. Campbell, Clerk.

17 *Index.*

18 In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Case Made.

Be it remembered. That the above entitled cause was instituted and commenced on February 22nd, 1911, by the filing in the office of the Clerk of the District Court of Rogers County, Oklahoma, a petition, which was subsequently amended, said amended petition being filed with said Clerk on the 6th day of September, 1911, which, together with the exhibits thereto attached, is as follows:
Filed Apr. 6, 1912, W. H. L. Campbell, Clerk.

19 *Amended Petitions.*

In the District Court within and for Rogers County, State of Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Comes now Wellsville Oil Company, a corporation, and for its first cause of action against the defendants, states:

I.

1. That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that it has complied with the constitution and laws of the State of Oklahoma relating to foreign corporations, and has full authority to transact business within said State of Oklahoma.
2. That the defendant Martha Miller, née Everett, is a resident and citizen of Nowata County, Oklahoma, and the lands involved in this suit are located in Rogers County, Oklahoma.
3. That the plaintiff is informed and believes, and so believing alleges, that the Alpha Oil Company is a corporation duly organized and existing under and by virtue of the laws of the State of Oklahoma, with its principal place of business at Tulsa, Oklahoma.
20 4. That the defendant Martha Miller, née Everett, was at all times mentioned in this petition the allottee and the

owner in fee simple of the following described land situate in Rogers County, Oklahoma, to wit:

The South half of southeast quarter of Section Seventeen (17), Township Twenty-four (24) North, Range Seventeen (17) East, containing 80 acres, more or less.

5. That the plaintiff was the owner of an oil and gas mining lease covering the above described land executed by Calvin Everett, guardian of said Martha Miller, née Everett, which said lease was to expire on the 16th day of March, 1908.

6. That notwithstanding the short duration and term of said lease, and relying upon the promises, agreements and assurance of Calvin Everett, Guardian of said Martha Miller, née Everett, and said Martha Miller, née Everett, herself, plaintiff proceeded to develop and mine the above described land for oil and gas under the terms of said lease, thereby expending large sums of money, properly protecting said property from drainage by wells on adjoining properties and securing for said Martha Miller, née Everett, a large income and profit derived from said oil and gas mining operations as aforesaid.

7. That on or about the — day of ——, 1907, and in pursuance of said promises, agreements and understanding, Martha Miller, then Martha Everett, through her father and legal guardian, Calvin Everett, filed her certain petition in equity in the United States Court for the Northern Judicial District of the Indian Territory, sitting at Nowata, which said petition set forth and described the necessity for the execution of an oil and gas mining lease covering the above described land to the plaintiff to continue for fifteen years from its date; a copy of said petition in equity is
21 attached hereto, made a part hereof, and marked "Exhibit A."

8. That upon the filing of said petition in equity, the United States Court for the Northern District of the Indian Territory, sitting at Nowata, referred the matter therein to a Special Master-in-Chancery, with direction to take testimony and make due report of his findings to the Court; that said Master proceeded to and did take testimony and make due report of his findings thereof to the Court and recommended in his report the making of the lease which is set out hereinafter and marked "Exhibit C."

9. That upon the filing of said report of said Master, said United States Court for the Northern Judicial District of the Indian Territory, sitting in Chancery at Nowata, authorized, empowered and directed Calvin Everett, as guardian of the person and estate of Martha Miller, née Everett, to join with said Martha Miller, née Everett, in the execution of an oil and gas mining lease on the above described land to the plaintiff under the terms and conditions in said order contained and for a bonus of Sixteen Hundred Dollars ($1600.00) to be paid according to the terms of said order, a copy of which order is attached hereto, made part hereof, and marked "Exhibit B."

10. That in conformity with said order, Calvin Everett, guardian of said Martha Miller, née Everett, joined with said Martha Miller,

née Everett, in the execution to this plaintiff of a certain oil and gas mining lease covering the above described land, to continue for fifteen years from its date, a copy of which lease will be attached hereto, made part hereof, and marked "Exhibit C."

11. That the bonus of Sixteen Hundred Dollars ($1600.00) to be paid for said lease was deposited in the Union Bank & Trust Company bank in Chelsea, Indian Territory, in conformity with the order of court hereinbefore referred to.

22 12. That on the 24th day of July, 1907, Calvin Everett, guardian and next friend of Martha Everett, now Miller, filed his report in said United States for the Northern Judicial District of the Indian Territory sitting in Chancery, disclosing the execution of the above described oil and gas mining lease to this plaintiff, and that on said 24th day of July, 1907, said United States Court sitting in Chancery approved, ratified and confirmed the execution of said lease by said Calvin Everett, guardian of the person and estate of Martha Miller, then Everett, a copy of which order is attached hereto, made part hereof and marked "Exhibit D."

13. That under and by virtue of the lease hereinbefore set out and marked "Exhibit C," the plaintiff, on the 16th day of March, 1908, entered into the possession of the above described land and continued the operation thereof for oil and gas mining purposes under the terms of said Exhibit C and said orders of court, and still continues to mine the same for oil and gas under the terms of said lease and said several orders of court.

14. That the plaintiff has tendered and offered to pay to said Martha Miller, née Everett, said sum of Sixteen Hundred Dollars ($1600.00) bonus due for said lease as set out in said several orders of court, and now brings said money into Court and tenders same unto this Court for the use and benefit of said Martha Miller, née Everett.

15. That the plaintiff has in all respects fully complied with all the terms, conditions and stipulations of said contract of lease.

16. That said contract of lease was duly and legally entered into between this plaintiff and the defendant Martha Miller, née Everett, and is a valid, existing and binding contract upon the parties

23 thereto, and that this plaintiff is entitled under said lease to the possession and control of the lands described in said lease for the purpose of conducting thereon oil and gas mining operations.

17. That plaintiff is informed and believes, and so believing avers that said Alpha Oil Company has entered into a conspiracy with the defendant Martha Miller, née Everett, for the purpose of hindering, delaying, obstructing and preventing operation of the land described in said lease for oil and gas mining purposes under the terms of said lease, and that the Alpha Oil Company has no right, title or interest in or to said land or in or to any oil or gas produced therefrom.

18. That this plaintiff has kept said oil property in the best possible condition and has expended great sums of money in developing and keeping the same, and has incurred all the hazard and risk incident to such developments.

19. That this plaintiff has placed in charge of said property a manager skilled and experienced in the producing of oil and that plaintiff is informed and believes that said Alpha Oil Company has paid no money to Martha Miller, née Everett, for the pretended lease which said company claims to have on said land, but that said arrangement between said Alpha Oil Company and said Martha Miller, née Everett, is for the purpose of cheating and defrauding this plaintiff out of its title to the lease hereinbefore described and of its right to operate the lands therein described for oil and gas mining purposes.

20. That this plaintiff is informed and believes, and so believing alleges that the defendant the Alpha Oil Company claims to have some right or interest in or to the leased premises described in this petition.

24 21. Plaintiff further avers and alleges that the pretended claim or right of the said Alpha Oil Company has no foundation in fact or in law and is based upon an alleged lease from Martha Miller, nee Everett, to the said Alpha Oil Company, executed long subsequent to the lease to the plaintiff herein and after the time when the said Martha Miller, nee Everett, had executed a valid, legal and binding lease to the plaintiff herein and at a time when the said Martha Miller had no legal right or authority to make a binding lease upon said premises to any other party; and at a time when this plaintiff was in rightful possession of said land, in pursuance of said lease made and executed under the proceedings hereinbefore set out, and that said lease had been regularly and properly ratified and confirmed and approved by the United States Court for the Northern District of the Indian Territory.

22. That at the time said lease herein set out was made and entered into the Secretary of the Interior was claiming and exercising the right of approval and disapproval of minor leases, but that his claim of the power to exercise such right was in violation of the laws of the United States in relation to the leasing of minor lands in the Cherokee Nation and was the exercise of a right or a claim not conferred upon the Secretary of the Interior by any law, and that under the law as applicable to such minor leases of the Cherokee allottees the Secretary of the Interior did not, at that time, possess any right of approval or disapproval of a minor lease for oil and gas which had been passed upon by the United States Court for the Northern District of the Indian Territory, and that at the time this lease was approved by the said United States Court the action of said Court was final and binding upon all parties thereto and the Secretary of the Interior had neither power

25 to approve or disapprove said lease or to take any action in connection with the same in any manner. That at the time the said lease was entered into the Secretary of the Interior still claimed and exercised the right of dominion and control over such minor leases and claiming illegally and wrongfully and in violation of law the right to approve and disapprove leases of this character, used such power as he claimed, to prevent the sale or disposition of oil from leases which were not forwarded to his office for the

purpose of such approval or disapproval, and operations of such leases could not be peacefully carried on without submitting such leases to the Secretary of the Interior, for the reason that he, the Secretary of the Interior, claimed and exercised arbitrary control and regulation of such leases and of the operations of the same and of pipeline companies taking oil from such leases, and refused to permit oil to be run from such leases by the pipeline companies and directed and ordered such pipeline companies as connected with leases of this character, not to pay for any oil to the lessees except upon leases approved by the said Secretary and upon division orders approved and signed by the Indian Agent, who is under the control of the Department of the Interior, all of which action was in violation of the law and was outside of and beyond the legal powers or duties of the Secretary of the Interior and was the exercise of powers and duties not conferred upon said Secretary by any law and was in contravention of and in conflict with the powers conferred upon the United States Courts of the Indian Territory in the approval of minor leases for oil and gas, and all of which things were wrongful and illegal and constituted and amounted to duress upon your petitioner in the exercise of its lawful rights in
26 and under the contract and agreements in said lease between itself and said lessor. That at the time of the execution of the lease set out in Exhibit "C", the United States Court for the Northern District of the Indian Territory were acquiescing in and admitting the power and authority claimed by the Secretary of the Interior in violation of law and were making all orders and decrees with respect to the leases of minor fullblood Cherokee allottees subject to approval by the Secretary of the Interior. That such orders and decrees in so far as they attempted to confer any jurisdiction upon the Secretary of the Interior to approve or disapprove such orders or decrees of the United States Courts on leases granted thereunder, were in contravention of law and to such extent inoperative and mere surplusage and did not in any way affect the rights of the parties to such contracts of lease or to the contracts themselves. That the United States Court for the Northern District of the Indian Territory did, in due course of law, direct Martha Everett and her guardian, Calvin Everett, to make a lease to your petitioner; that the same was duly and regularly made and executed by said Martha Everett and her guardian, Calvin Everett, to the plaintiff herein. That said lease, when so made, was duly ratified, approved and confirmed by said United States Court and the terms and conditions of said lease were complied with by the plaintiff herein and the same became, was and is a lawful, valid, subsisting lease between the plaintiff herein and the defendant Martha Everett.

23. That notwithstanding these facts and the decrees of the United States Court properly entered as aforesaid, the Secretary of the Interior has without warrant of law, and illegally, unlawfully and wrongfully attempted to disapprove said lease and to deny
27 the validity of the same and Martha Miller, nee Everett, the defendant herein, in violation of law and of the terms of said lease, which was and is a valid and subsisting contract between

herself and the plaintiff herein, has illegally, unlawfully and wrongfully attempted to make a new lease to the defendant the Alpha Oil Company in violation of the rights and privileges of the plaintiff herein and in violation of the existing contract between plaintiff and defendant.

24. Plaintiff further alleges that under and by virtue of its lease, it has the unqualified right to the peaceful and uninterrupted possession of the said premises for the full term of fifteen years according to the contract of lease herein set out. That said Martha Miller and Alpha Oil Company have threatened to and actually have by superior force dispossessed the plaintiff herein and have taken forcible possession of said premises in violation of the rights of said plaintiff herein and of the order of injunction heretofore issued. That an irreparable injury will be sustained by the plaintiff in that it will not have the privilege of conducting operations in conformity with its said lease, and the oil operations now being conducted thereon by said defendants will not be conducted with skill and that said defendants and each of them are incompetent to manage, handle and control an oil property. That drilling operations in the vicinity and adjacent thereto render it absolutely necessary that the wells upon said land should be cared for continuously in a skillful and workmanlike manner, and unless this plaintiff has the right to operate said lands in such manner, it will suffer irreparable injury. The nature of the oil and gas production is such that in cases of this kind and character the amount of damages suffered or likely to be suffered, is impossible of determination and
28 that to permit the defendants herein to continue in possession of said land would render necessary a multiplicity of suits.

25. Plaintiff further avers that the defendants and each of them are incapable of responding in damages in a sum sufficient to compensate the plaintiff for such damages as will necessarily arise out of the oil and gas operation as above set forth and arise because the plaintiff herein is deprived of the legal and rightful possession of said land under its said contract.

26. Plaintiff further alleges and states that it has no plain, speedy or adequate remedy at law and that it has no remedy at law.

27. That the plaintiff is now in the possession of the lands covered by said lease and in possession of the oil wells thereon, and is operating and developing the lands covered thereby.

And plaintiff, for its second cause of action against the defendant, says:

II.

1. Plaintiff hereby adopts and makes a part of this second cause of action, all of the allegations contained in the first cause of action alleged herein.

2. That for many months after the 18th day of March, 1908, plaintiff continued in possession of said land and continued at its own expense to operate and pump the oil wells thereon, running all of the oil produced into the pipeline of the Prairie Oil & Gas Com-

pany, that on or about the — day of ——, 19—, the defendant Alpha Oil Company fraudulently hired the pumper whom this plaintiff had placed in charge of said lease, to become the agent
29 and representative of the defendant Alpha Oil Company, and to hold, or pretend to hold, possession of said lease and to operate the same for said Alpha Oil Company instead of for this plaintiff; that for some months thereafter, and over the protest of this plaintiff, the defendant Alpha Oil Company continued to assert possession of said lease through said agent and employee; that on or about the month of July or August, 1910, the Alpha Oil Company abandonded possession of said land and the oil wells thereon, and refused to incur any further expense in connection with the production of oil from said land; that to preserve the value of the oil wells on said land and to preserve the value of the land itself as an oil producing property, and to preserve the rights of this plaintiff under its lease covering said land, plaintiff immediately placed in charge of said lease a competent pumper and at all times since said month of July or August, 1910, has continued to keep said pumper in possession of said land and said oil wells, and has continued to produce oil from said land, all at its own cost and expense; that at no time during the two intervals that this plaintiff has produced oil from said land, has this plaintiff received payment for any oil produced by its efforts and at its expense as aforesaid, but that, on the contrary, the proceeds of all oil belonging to the working interest under said lease were held by the Prairie Oil & Gas Company, the pipe-line company purchasing said oil, which fund finally reached the sum of twelve or thirteen thousand dollars, and which said fund has recently been paid to the Clerk of this Court by the Prairie Oil & Gas Company under order of this Court; that during all of said time since said 18th day of March, 1908, the said Martha Miller has received payment for the royalty portion of said oil so pro-
30 duced by the efforts and at the expense of this plaintiff, that the expenses thus incurred by this plaintiff were in all respects necessary to properly produce oil from said land and to keep the oil wells thereon and the equipment thereof in proper condition as an oil producing property, and that said expenditures up to the time of the filing of this petition amount to $2500.00; that during the period of said expenditures this plaintiff relied upon its title to said lease for oil and gas mining purposes covering said land, and that said expenditures were made in pursuance thereof, and that this plaintiff is entitled to reimbursement for said expenditures out of said fund now in the custody of this Court. That the value of the personal property, machinery and equipment on said lease, placed there by this plaintiff and belonging to this plaintiff, and used in connection with the development of said lease for oil and gas mining purposes, is at least $8,000.00, and that plaintiff is entitled to reimbursement for the value of such property out of said fund.

Wherefore, plaintiff prays that the lease set out in "Exhibit C" attached hereto be declared a valid, legal, binding and subsisting agreement between the parties thereto; and that the defendant Martha Miller, née Everett, and the defendant the Alpha Oil Com-

pany be enjoined and restrained from in any manner interfering with the plaintiff in the possession, use, occupancy, development or operation of the land described in said lease for oil and gas mining purposes. That the pretended lease executed by Martha Miller, née Everett, to the Alpha Oil Company be declared to be invalid and void and that the same be canceled of record and that upon final hearing a permanent injunction issue herein restraining and enjoining the defendants and each of them permanently from interfering with this plaintiff in the operation of this lease for oil and gas purposes
31 and the production of oil and gas therefrom; that if the Court decree that this plaintiff has no valid and subsisting lease covering said land, that it further decree that this plaintiff have reimbursement for all necessary and proper expenses incurred by it in the production of oil from said land to the date of such decree, and that said reimbursement be made out of the fund now in the custody of this Court, and that the plaintiff have such other and further equitable relief as shall be just in the premises.

VEASEY & ROWLAND,
Attorneys for the Plaintiff.

STATE OF OKLAHOMA,
Washington County, ss:

James A. Veasey, being duly sworn, says that he is one of the attorneys for the plaintiff herein; that said plaintiff is a foreign corporation, and that no one of the officers of said company resides within the State of Oklahoma; that he has read the foregoing petition and is acquainted with the matters and things set out therein, and that the same are true in substance and in fact.

JAS. A. VEASEY.

Subscribed and sworn to before me this 5 day of September, 1911.
[SEAL.] A. G. CRONINGER,
Notary Public.

My commission expires July 21, 1915.

32 EXHIBIT "A."

Petition in Equity.

In the United States Court for the Northern Judicial District, Indian Territory, Sitting at Nowata.

In re Application of CALVIN EVERETT, Guardian of Martha Everett, a Minor, to be Authorized to Join the said Martha Everett in the Execution of an Oil and Gas Mining Lease to the Wellsville Oil Company, a Corporation, said Lease to Continue Beyond the Minority of said Minor.

To the Honorable Chancellor:

Comes now Calvin Everett, guardian of the above named minor and respectfully represents unto the Honorable Chancellor as follows:

That said minor was born on the 17th day of March, 1890, as a result of which her minority will extend but for the period of about one year.

That said minor is the allottee in the Cherokee Nation of the following described land in said Nation, towit:

The South Half of the Southeast Quarter of Section Seventeen (17), Township Twenty-four (24) North, Range Seventeen (17) East, containing 80 acres, more or less.

That on or about the 5th day of April, 1905, and under proper Order of Court, your petitioner executed an oil and gas mining lease on the above described land, to Sidney R. Bartlett and Edwards H. Smith, of Independence, Kans., which said lease was to continue for the minority of said minor. That said lease was subsequently approved by the Secretary of the Interior and that recently the Secretary of the Interior has approved the assignment of said lease to the Wellsville Oil Company, a corporation of Wellsville, New York.

That since the approval of said lease, said Wellsville Oil Company, of Wellsville, New York, operating first, under a drilling contract and secondly under its duly approved assignment, has drilled seventeen (17) wells on said land, all but two (2) of which were producing wells.

That owing to the fact that the lease on said allotment is to continue but for a period of about one year, said Wellsville Oil Company, in order to protect itself, began in the month of November, 1906, to pump all of said wells both day and night, to such an excessive extent that said Company will probably secure the greater part of the oil underlying said land before its said lease expires.

33 That the price of oil is so exceedingly low at this time that your petitioner believes that it is of great damage and loss to the estate of said minor to have said production of said lease rushed to the extent now being done, and believes that a more gradual production of said oil would enable said minor to receive the benefit of the anticipated increase of the price to be received for said oil.

That said Wellsville Oil Company has proposed to your petitioner that they will discontinue all excessive and damaging pumping of said property, upon the condition that said Company receive from your petitioner a lease for oil and gas mining purposes to continue for fifteen years from its date, and that said proposition contemplates the payment by said Company of a cash bonus of Fifteen Dollars ($15.00) an acre and an additional royalty of two and one-half (2½) per cent. for said lease continuing for said additional period.

That it is absolutely necessary to the preservation of the estate of said minor in said oil that said excessive pumping be discontinued and that said additional bonus and said additional royalty is a reasonable consideration for said lease, in view of all the circumstances of the case.

That your petitioner believes that it will be to the best interests of said minor to direct your petitioner and said minor to join in the

execution of an oil and gas mining lease on the above described land to said Wellsville Oil Company, said lease to continue for a period of Fifteen (15) years from its date, the same to reserve a royalty of twelve and one-half (12½) per cent. of the oil produced and your petitioner as guardian to receive for the use of said minor, an additional bonus of Fifteen Dollars ($15.00) an acre for said lease.

His
CALVIN x EVERETT.
mark.

UNITED STATES OF AMERICA,
Northern Judicial District,
Indian Territory, ss:

Be it remembered, that on this — day of ——, before me, a Notary Public in and for the Territory and District aforesaid, personally appeared Calvin Everett, to me well known as the person he represents himself to be, who being by me first duly sworn, states that he has read the foregoing petition and is fully acquainted with the contents thereof, and that the same are true in substance and in fact, as he verily believes.

—— ——,

Subscribed and sworn to before me this — day of ——, 1907.

—— ——.
Notary Public.

My commission expires —— —, ——.

34 EXHIBIT "B."

Order of Court.

In the United States Court for the Northern Judicial District, Indian Territory, Sitting at Nowata.

In re Application of CALVIN EVERETT, Guardian of MARTHA Everett, a Minor, to be Authorized to Join the said Martha Everett in the Execution of an Oil and Gas Mining Lease to the Wellsville Oil Company, a Corporation, said Lease to Continue Beyond the Minority of said Minor.

Comes now Calvin Everett, guardian of the above named minor, and the matter of the petition of said guardian to be authorized to execute a lease upon the allotment of said minor coming on in its order to be heard, the Court being satisfied in the premises from the verified petition of said guardian and the testimony in support thereof, finds:

First. That said minor was born on the 17th day of March, 1890, and that her minority will extend but for the period of about one year and one month.

Second. That on the 5th day of April, 1905, under proper Order of Court, a lease for oil and gas mining purposes was executed on the allotment of said minor to Sidney R. Bartlett and Edwards H. Smith, of Independence, Kansas, which said lease has been subsequently assigned to the Wellsville Oil Company, of Wellsville, New York, with the approval of the Secretary of the Interior.

Third. That since the approval of said original lease, said Wellsville Oil Company has drilled seventeen (17) oil wells on the allotment of said minor, all but two of which are producing wells.

Fourth. That owing to the fact that said lease is to endure for such a short time, said Wellsville Oil Company, is pumping said producing wells both day and night, to such an excessive and unreasonable extent that the greater part of the oil underlying said land will be exhausted by the time said lease terminated.

Fifth. That the price now paid for crude petroleum is so low that it is not to the interest of the estate of said minor to have said oil produced in the quantities now being done but that said oil should be pumped in a usual and normal manner, so that the production from said wells shall extend over a considerable period and said minor receive the benefit of such advance in price as she may obtain in the case of crude oil.

Sixth. That said Wellsville Oil Company is willing to discontinue the unusual and excessive pumping of oil from said land, provided it receives a lease for oil and gas mining purposes to continue for fifteen years, on the lands of said minor, for which new and additional lease said Company will pay an additional royalty of two and one-half (2½) per cent. or twelve and one-half (12½) per cent. in all, and a bonus of Twenty Dollars ($20.00) an acre, which said additional royalty and bonus are reasonable in view of all the circumstances in the case.

Seventh. That the making of a lease on the allotment of said minor under the terms hereinbefore set out would be to the advantage of the estate of said minor and great and irreparable loss would result to said estate, were said proposition not accepted.

It is therefore considered, ordered and adjudged by the Court, that Calvin Everett, guardian of the person and estate of the above named minor, Martha Everett, be and he hereby is authorized and empowered to join with said Martha Everett in the execution of an oil and gas mining lease on the allotment of said Martha Everett, to the Wellsville Oil Company, a corporation of Wellsville, New York, which said lease shall be executed in conformity with the regulations of the Secretary of the Interior, reserve a royalty of twelve and one-half (12½) per cent, continue for fifteen (15) years from its date, and for which lease the guardian shall receive a bonus of Twenty Dollars ($20.00) an acre for the use and benefit of said minor, which said bonus shall be deposited in the Union Bank & Trust Co. of Chelsea, I. T., there to be and remain in escrow until the approval of said lease by the Secretary of the Interior, at which time the same shall be paid to said guardian for the use aforesaid.

It is further ordered and adjudged by the Court, that upon the approval of the lease herein authorized, by the Secretary of the

Interior, that the lease hereinbefore authorized by the court and the order of Court authorizing the same, as well as the Order of Court confirming the same, on April 5th, 1905, stand vacated and be of no further force or effect.

It is further ordered and adjudged by the Court, that said guardian shall, upon the execution of said lease, make a full report of his doings in connection therewith and that upon receiving said bonus of Twenty Dollars an acre, that he execute to the United States of America an additional bond in the sum of Thirty-two Hundred Dollars, conditioned for the faithful accounting of the proceeds of said lease.

Done at Nowata, Indian Territory, this 7th day of June, 1907.

LUMAN F. PARKER, JR.
U. S. Judge.

36 EXHIBIT "C."

Lease.

(Form A—For Full-blood Indians of the Five Civilized Tribes.)

Transferable Only with Consent of the Secretary of the Interior.

Oil and Gas Mining Lease upon Land Selected for Allotment, Cherokee Nation, Indian Territory.

(Secs. 19 and 20, Act of April 26, 1906.)

This indenture of lease, made and entered into in quadruplicate on this 19th day of June, A. D. 1907, by and between Calvin Everett, Guardian of Martha Everett, a minor, and Martha Everett for herself, of Nowata, Indian Territory, parties of the first part, lessors, and Wellsville Oil Company, a Corporation organized and existing under the laws of the State of New York, and authorized to carry on business in the Indian Territory, of Wellsville, New York, party of the second part, lessee, under and in pursuance of the provisions of sections 19 and 20 of the act of Congress approved April 26, 1906, and the regulations prescribed by the Secretary of the Interior thereunder.

Witnesseth: That the parties of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agree to be paid, observed, and performed by the party of the second part, its heirs, successors, and assigns, do hereby demise, grant, and let unto the party of the second part, its heirs, successors, and assigns, for the term of 15 years from the date hereof, all of the oil deposits and natural gas in or under the following described tract of land, lying and being within the Cherokee Indian Nation and within the Indian Territory, to wit: The South half of the Southeast Quarter of *of* section 17, township 24 N. range 17 E. of the Indian Meridian, and containing 80 acres, more or less, with the right to prospect for, extract, pipe, store,

refine, and remove such oil and natural gas, and to occupy
37 and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining, and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel so far as it is necessary to the prosecution of said operations.

In consideration of which the party of the second part hereby agrees and binds itself, its heirs, successors, and assigns, to pay or cause to be paid to the United States Indian Agent, Union Agency, Indian Territory, for the lessors, as royalty, the sum of 12½ per cent. of the gross proceeds, on the leased premises, of all crude oil extracted from the said land, such payment to be made at the time of sale of disposition of the oil; and the lessee shall pay, in yearly payments, at the end of each year, one hundred and fifty dollars royalty on each gas-producing well which it shall use. The lessor shall have the free use of gas for lighting and warming his residence on the premises. It is further agreed that a failure on the part of the lessee to use a gas-producing well, where the same can not be reasonably utilized at the rate so prescribed, shall not work a forfeiture of its lease so far as the same relates to mining oil, but if the lessee desires to retain gas-producing privileges it shall pay a royalty of fifty dollars per annum, in advance, on each gas-producing well not utilized, the first payment to become due and to be made within thirty days from the date of the discovery of gas.

38 And the party of the second part further agrees and binds itself, its heirs, successors, and assigns, to pay, or cause to be paid to the said agent, for lessor, as advanced annual royalty on this lease, the sums of money as follows; to wit: Fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance, for the third and fourth years, and seventy-five cents per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties; and further, that should the party of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, the Secretary of the Interior, after ten days' notice to the parties, may declare this lease null and void, and all royalties paid in advance shall become the money and property of the lessors.

The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to drill at least one well thereon within twelve months from the date of the approval of the bond by the Secretary of the Interior, and should the party of the second part fail, neglect, or refuse to drill at least one well within the time stated, this lease may, in the discretion of the Secretary, be declared null and void, after ten days' notice to the parties; provided that

the lessee shall have the privilege of delaying operations for a period not exceeding five years from the date of the approval of the bond to be furnished in connection herewith, by paying to the United States Indian agent, Union Agency, Indian Territory, for the use and benefit of the lessors, in addition to the required annual
39 advanced royalty, the sum of one dollar per acre per annum for each leased tract remaining undeveloped, but the lessee may be required to immediately develop the tracts leased, should the Secretary of the Interior determine that the interests of the lessors demand such action.

The party of the second part further agrees to carry on operations in a workmanlike manner to the fullest possible extent, unavoidable casualties excepted; to commit no waste on said land, and to suffer no waste to be committed upon the portion in its occupancy or use; to take good care of the same, and to promptly surrender and return the premises upon the termination of this lease to the parties of the first part or to whomsoever shall be lawfully entitled thereto, and not to remove therefrom any buildings or permanent improvements erected thereon during the said term by the said party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, excepting the tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells, shall remain the property of the said party of the second part, and may be removed at any time before the expiration of sixty days from the termination of the lease; that it will not permit any nuisance to be maintained on the premises under its control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; that it will not use such premises for any other purposes than those authorized in this lease, and that before abandoning any well it will securely plug the same so as to effectually shut off all water above the oil-bearing horizon.

40 And the said party of the second part further covenants and agree that it will keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchasers, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in said prospecting and mining operations, and upon all of the unsold oil obtained from the land herein leased, as security for the payment of said royalty.

And it is mutually understood and agreed that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation, and that this lease, or any interest therein, shall not, by working or drilling contract or otherwise, or the use thereof, directly or indirectly, be sublet, assigned, or transferred without the consent of the Secretary of the Interior first obtained, and that should it or its sublessees, heirs, executors, administrators, successors, or assigns

violate any of the covenants, stipulations, or provisions of this lease, or any of the regulations, or fail for the period of sixty days to pay the stipulated royalties provided for herein, then the Secretary of the Interior, after ten days from notice to the parties hereto, shall have the right to avoid this indenture of lease and cancel the same, when all the rights, franchises and privileges of the lessee, its sublessees, heirs, executors, administrators, successors, or assigns hereunder, shall cease and end without resorting to the courts and without further proceedings, and the lessor shall be entitled to immediate possession of the leased land and the permanent improvements located thereon.

41 If the lessee makes reasonable and bona fide effort to find and produce oil in paying quantity, as herein required of it, and such effort is unsuccessful, it may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all its then accrued and payable obligations hereunder: Provided, however, That approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further expressly agreed that this lease is made with full knowledge of the fact that under the regulations prescribed by the Secretary of the Interior governing the leasing of lands in the Cherokee Nation, Indian Territory, lessees are prohibited from being directly or indirectly interested in leases, in their own names or in the names of the persons, or as owners or holders of stock in corporations, or as members of associations, covering an aggregate of more than 4,800 acres of land in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Nations, that the said prohibition is made a part and condition of this lease, and that the Secretary of the Interior reserves the right to cancel leases at any time during the period which they are to run, after notice as herein mentioned, when he is satisfied that the terms of the lease or of the regulations heretofore or hereafter prescribed have been violated in any particular, and it further agrees not to transfer, assign, or sublet, by working or drilling contract or otherwise, or allow the use of the land leased, or any oil or gas in or under it, without first obtaining the consent of the Secretary of the Interior, and that any violation of the lease or of the regulations heretofore or hereafter prescribed by the Secretary of the Interior, respecting oil and gas leases

42 in the Cherokee Nation, shall render this lease subject to cancellation, after ten days from receipt by it of notice, in the discretion of the Secretary of the Interior, whose declaration of cancellation shall be effective without resorting to the court and without further proceedings, and that the lessors shall then be entitled to immediate possession of the land.

If, at any time, the Secretary of the Interior, after due notice to the persons or parties interested, determines that any person, partnership, or corporation has, by means of stock ownership or otherwise, directly or indirectly, obtained and holds interests in leases

of oil and gas properties in said Territory, said leases covering, in the aggregate, an area of more than 4,800 acres, and further finds that the property herein leased is a part of said aggregate area, then the Secretary of the Interior may cancel this lease in the same manner as provided for in the case of any violation of the terms of said lease.

It is further agreed and understood that the approval of this lease shall be of no force or effect, unless the party of the second part furnish, within sixty days from the date of approval of the application filed in connection herewith, a bond to the satisfaction of the Secretary of the Interior, in accordance with the regulations of July 7, 1906, prescribed by him, which shall be deposited and remain on file in the Indian Office during the life of this lease.

In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

His
CALVIN x EVERETT. [SEAL.]
mark.
MARTHA EVERETT. [SEAL.]
WELLSVILLE OIL COMPANY. [SEAL.]
By JAMES MACKEN, *Vice-President.*

Attest:

L. H. MOULTON, *Secretary.*

Two witnesses to execution by lessor:

ULYSSES E. DODSON,
P. O. Nowata, I. T.
FRANK MASON,
P. O. Nowata, I. T.

43 Two witnesses to execution by lessee:

RUTH MACKEN,
P. O. Wellsville, N. Y.;
S. A. HARVEY,
P. O. Wellsville, N. Y.,
As to President and Secretary.

UNITED STATES OF AMERICA, INDIAN TERRITORY,
Northern Judicial District, ss:

Be it remembered, that on this day came before me, the undersigned Notary Public within and for the Northern Judicial District of the Indian Territory aforesaid, duly commissioned and acting as such, Calvin Everett, Guardian of Martha Everett, a minor, and Martha Everett, to me personally well known as the parties lesser in the within and foregoing lease, and stated that they executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

Witness my hand and seal as such Notary Public on this 19th day of June, 1907.

[SEAL.] J. C. DENTON,
Notary Public.

(My commission expires November 2nd, 1908.)

Original. 15763. Department of the Interior, Washington, D. C. Oil and Gas Mining Lease. (Full-Bloods.) Cherokee Nation, Ind. T. Calvin Everett, Guardian of Martha Everett, a minor, and Martha Everett, to Wellsville Oil Company, of Wellsville, New York, of S/2 of S. E./4, Sec. 17, Tp.24 N. Range 17 E. in the Cherokee Nation, Indian Territory. Dated June 19th, 1907. Expires June 18th, 1922. Filed for record this — day of ——, 190-, at 4:30 o'clock P. M. 12/100. 9/16. 107. 2/249. By —. Oct. 1. H.

44 Department of the Interior.

U. S. Indian Service.

Union Agency.

MUSKOGEE, IND., T., Oct. 3, 1907.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved.
See my report of even date.

DANA H. KELSEY,
U. S. Indian Agent.

Department of the Interior.

Office of Indian Affairs.

WASHINGTON, D. C., Oct. 22, 1907.

Respectfully submitted to the Secretary of the Interior with recommendation that it be approved subject to regulations of June 11, 1907, as amended October 14, 1907, and Department letter of September 26, 1907 (5-34).

C. F. LARRABEE,
Acting Commissioner.

Department of the Interior.

WASHINGTON, D. C., Nov. 6, 1907.

Disapproved.

JESSE E. WILSON,
Assistant Secretary of the Interior.

45 EXHIBIT "D."

In the United States Court for the Northern Judicial District of the Indian Territory, Sitting at Nowata.

In re ex Parte Petition of CALVIN EVERETT, Guardian and Next Friend of Martha Everett.

On the 24th day of July, 1907, comes on to be heard the report of Calvin Everett, Guardian and next Friend of Martha Everett, relative to leasing the lands of said minor unto the Wellsville Oil Company, and the court being sufficiently advised finds that the said Guardian has fully complied with the Court's order in the execution of such lease and that he has filed a bond in the sum of Three Thousand, Two Hundred Dollars ($3200.00) conditioned as required by law.

It is, therefore, ordered: That said lease and said bond be and they are hereby approved, ratified and confirmed.

Done at Nowata in open court.

LUMAN F. PARKER, JR.,
U. S. Judge.

Endorsements: No. 930. Wellsville Oil Company, a corporation, vs. Martha Miller, née Everett, and Alpha Oil Company, a corporation. Amended Petition. District *Clerk*, Claremore, Rogers County, State of Oklahoma. Filed Sept. 6, 1911. Lee Settle, District Clerk. Veasey & Rowland, Attorneys & Counsellors at Law, Second Floor Trust Building, Bartlesville, Okla.

46 That thereafter, to wit, on the 21st day of September, 1911, the defendant Martha Miller, née Everett, filed her separate demurrer to the amended petition of the plaintiff herein, which demurrer is as follows:

47 *Demurrer.*

In the District Court of Rogers County, State of Oklahoma.

#930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Comes now the defendant, Martha Miller née Everett, and files her separate demurrer to the amended petition of the plaintiff herein, and as grounds for said demurrer states:

1. That this Court has no jurisdiction of the subject matter in-

volved in this cause, and is without authority to make and enter the decree prayed for in the plaintiff's petition.

2. The said amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

3. That the Court is without jurisdiction or authority of law to make an order or grant any of the relief prayed for in the plaintiff's petition.

Wherefore, this defendant prays that she be not required to plead further to the amended petition of the plaintiff filed herein, and that she be allowed to go hence without costs.

P. J. HURLEY AND
TILLOTSON AND ELLIOTT,
Attorneys for Martha Miller, née Everett.

Endorsed: No. 930. Wellsville Oil Company, a corporation, Plaintiff, vs. Martha Miller née Everett, and Alpha Oil Company, a corporation, Defendants. Separate Demurrer to amended
48 petition of Martha Miller. District Clerk, Claremore, Rogers County, State of Oklahoma. Filed Sep. 21, 1911. Lee Settle, District Clerk, by C. T. McClellan, Deputy. P. J. Hurley, Attorney at Law. Tulsa, Okla.

49 That on the same day, to wit, September 21, 1911, the defendant Alpha Oil Company filed its separate demurrer to the amended petition of the plaintiff herein, which demurrer is as follows:

50 *Demurrer.*

In the District Court of Rogers County, State of Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Comes now the defendant, Alpha Oil Company, a corporation, and files its separate demurrer to the amended petition of the plaintiff herein, and as a grounds for said demurrer states:

1. That this Court has no jurisdiction of the subject matter involved in this cause, and is without authority to make and enter the decree prayed for in the plaintiff's petition.

2. The said amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant.

3. That the Court is without jurisdiction of authority of law to make an order or grant any of the relief prayed for in the plaintiff's petition.

Wherefore, this defendant prays that it be not required to plead further to the amended petition of the plaintiff filed herein, and that it be allowed to go hence without costs.

P. J. HURLEY,
Attorney for Alpha Oil Company, a Corporation.

Endorsements: No. 930. Wellsville Oil Co., a corporation, Plaintiff, vs. Martha Miller, née Everett, and Alpha Oil Company, a corporation, Defendant. Separate Demurrer to amended
51 petition of Alpha Oil Company, a corporation. District *Clerk*, Claremore, Rogers County, State of Oklahoma. Filed Sep. 21, 1911. Lee Settle, District Clerk, by C. T. McClellan, Deputy. P. J. Hurley, Attorney at Law, Tulsa, Okla.

52 That thereafter, to wit, on the 5th day of December, 1911, the following further proceedings were had in said cause:

53 *Journal Entry.*

In the District Court of Rogers County, Oklahoma.

No. —.

WELLSVILLE OIL COMPANY, Plaintiff,
vs.
MARTHA MILLER and ALPHA OIL COMPANY, Defendants.

On this 5th day of December, 1911, comes on to be heard the demurrer in the above entitled cause filed by the defendants herein, the plaintiff appearing by its attorneys, Veasey & Rowland, and the defendant Alpha Oil Company appearing by its attorneys, P. J. Hurley, and the defendant Martha Miller by her attorneys, Tillotson & Elliott and P. J. Hurley.

And all parties announcing ready for the consideration of said demurrer, the Court considers the same after argument and finds that said demurrer should be sustained; to which ruling of the Court the plaintiff then and there excepted.

Whereupon the plaintiff elected to stand upon its amended petition, and on motion of defendants the Court renders judgment in favor of the defendants and said cause is dismissed and the temporary injunction issued herein is dissolved.

Thereupon counsel for the plaintiff excepted and prays an appeal, which was granted, and the plaintiff asked and was given sixty days within which to prepare and serve transcript or case made.

Thereupon the defendants are given twenty days thereafter in which to suggest amendments, same to be settled and signed on five days' notice given by either party.

54 Thereupon counsel in open court stipulated that the custody of the leasehold involved in this suit should remain in the plaintiff until the final adjudication hereof, and that the moneys

derived from the property should be paid by the purchasing pipe line unto the custody of the Clerk of the District Court, Rogers County, Oklahoma, to be by him deposited in some State Bank within the State of Oklahoma, and the filing of a supersedeas bond herein is waived.

It was further stipulated that the status of the property and of the parties shall remain the same until the final adjudication hereof.

The foregoing stipulation is approved by the Court and made a part of the final judgment herein.

T. L. BROWN,
District Judge.

O. K.
VEASEY & ROWLAND.
O. K.
TILLOTSON & ELLIOTT.
O. K.
P. J. HURLEY.

Endorsed: No. 930 Civil. Wellsville Oil Company vs. Martha Miller and Alpha Oil Company. Journal Entry. District Clerk, Claremore, Rogers County, State of Oklahoma. Filed Jan. 4, 1911. Lee Settle, District Clerk, by C. T. McClellan, Deputy.

55 *Notice.*

In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

To Martha Miller and her attorneys of record, P. J. Hurley and Tillotson & Elliott, and to Alpha Oil Company and its attorney of record, P. J. Hurley:

The foregoing pages, numbered one (1) to thirty-seven (37) inclusive, are hereby tendered to you as the case made in the above entitled cause and as containing all of the pleadings, evidence, demurrers, orders, findings and judgments of the court in said cause.

Signed this 27th day of January, 1912.

VEASEY AND ROWLAND,
Attorneys for Plaintiff.

56 *Stipulation.*

In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

It is hereby stipulated by and between P. J. Hurley and Tillotson & Elliott, attorneys for the defendant Martha Miller, and P. J. Hurley, attorney for defendant Alpha Oil Company, and Veasey & Rowland, attorneys for the plaintiff, Wellsville Oil Company, that the above and foregoing pages, numbered one (1) to thirty-seven (37 inclusive, constitute a true and correct case made in said cause, as containing all of the pleadings, evidence, demurrers, orders, findings and judgments of the court in said cause, and we hereby waive notice of application to have said case made settled and signed, and agree that same may be done immediately upon presentation to the Judge.

Signed this 27th day of January, 1912.

P. J. HURLEY,
TILLOTSON & ELLIOTT,
Attorneys for Defendant Martha Miller.
P. J. HURLEY,
Attorneys for Defendant Alpha Oil Company.
VEASEY AND ROWLAND,
Attorneys for Plaintiff.

57 *Certificate.*

In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

This is to certify that the within and foregoing case made was duly served within the time required, and in pursuance of the stipulation of counsel I hereby certify that the same as above set forth is true and correct and contains a full, true, complete and correct transcript and copy of all the pleadings, motions, demurrers, orders, evidence, findings, proceedings and judgments had in said cause, and I hereby allow, settle, certify and sign the same as true

and correct, and hereby order that the Clerk of this court attest the same with the seal of the court and file the same of record.

Witness my hand at chambers in the city of Claremore, on this 6" day of March, 1912.

T. L. BROWN,
District Judge.

Attest:
[SEAL.] LEE SETTLE, *Clerk.*

58 Said case made is endorsed as follows: District *Clerk* Claremore, Rogers County, State of Oklahoma. Filed Mar. 6, 1912. Lee Settle, District Clerk. No. 3785. Wellsville Oil Company, a corporation, Plaintiff in error, vs. Martha Miller, née Everett, and Alpha Oil Company, a corporation, Defendants in error. Petition in error and Case made. Filed Apr. 6, 1912. W. H. L. Campbell, Clerk.

59 And afterward, at the July, 1914, Term of said Supreme Court, on the 17th day of July, 1914, the following proceeding was had in said cause, to wit:

#3785.

WELLSVILLE OIL CO., Plaintiff in Error,
vs.
MARTHA MILLER, etc., et al., Defendants in Error.

And now on this day the above cause is argued orally and the cause is submitted on the record, briefs and oral argument.

60 And afterward, at the July, 1914, Term of said Supreme Court, on the 18th day of August, 1914, the following proceeding was had in said cause, to wit:

#3785.

WELLSVILLE OIL CO., Plaintiff in Error,
vs.
MARTHA MILLER et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed. Opinion by Galbraith, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is rendered accordingly.

61 *Petition for Rehearing.*

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Two.

No. 3785.

WELLSVILLE OIL COMPANY, Plaintiff in Error,
v.
MARTHA MILLER (née Everett) and THE ALPHA OIL COMPANY, Defendants in Error.

Now comes the plaintiff in error and respectfully moves the court for a rehearing in the above entitled cause, to the end that the court may enter a decree reversing the lower court, or modifying the decree of this court as rendered the 18th day of August, 1914.

The plaintiff in error is support of this motion for rehearing, respectfully suggests the following as its reasons and grounds for the rehearing:

1.

One of the questions involved in this action is the propriety or right of the district court of Rogers county, Oklahoma, to inquire into issues that were presented, examined by a master in chancery and passed upon by the United States Court for the Northern District of Indian Territory sitting as a court of equity. If that court had jurisdiction to hear and determine the matter of the leasing of the lands of Martha Everestt for oil and gas mining purposes, and in the absence of any issue or proof concerning fraud or mistake in procuring the judgment or order approving the said leasing transaction, the district court of Rogers County, Oklahoma, should regard the *the* orders of the United States Court as having all the sanctity that is usually accorded a court decree. Our own court in the case of Cowles v. Lee, has determined that the United States Court had jurisdiction to hear and determine matters similar to those involved in the proceeding which is herein attacked; and this court expressly refuses to overrule Cowles v. Lee, in the following lan-

62 guage:

"However, inasmuch as this Court in Cowles v. Lee, et al., 35 Okla., 159, has used language that might be interpreted to mean that in the opinion of this court the power of that court to make the order was in chancery as well as in probate, *we will assume for the purpose of this case that the court had the jurisdiction contended for by the plaintiff.*"

At this point, we respectfully suggest that the opinion of the Court rendered August 18, 1914, herein, contains an error which to our minds is such as ought to be corrected pursuant to this motion. Notwithstanding the position of the court, and the use of the language above quoted and underscored, the opinion proceeds to an examination of the conditions under which the United States Court

made the order authorizing and directing the lease. In fact, an examination of the syllabi will reveal only one ground for the final decree herein rendered, namely: that the decree of the United States Court is subject to attack in this case, and that as a result of that attack the court is able to say that the facts and circumstances presented to the United States Court and upon which its decree was based, were of such a nature that the United States Court should not have made its decree as it did. Moreover, the opinion goes further, and has the effect of binding this plaintiff in error by allegations contained in the petition of the guardian for authority to lease. Again, the opinion assumes a situation which is neither alleged, proved nor capable of proof, namely: that the Wellsville Oil Company was guilty of bad faith or lack of due diligence in the operation of the Martha Everett lease.

The allegations of the petition were before the United States Court, and it seems to us that we are not warranted in concluding that the United States Court would authorize the modification or extension of a contract which was at the time being improperly performed or negligently fulfilled by one of the parties to that contract. It would be unthinkable that a court would authorize such a proceeding.

63 We respectfully suggest that this court has fallen into the error, so adroitly introduced in the brief of the defendant in error, or presuming that because the property was being pumped continuously the Wellsville Oil Company was guilty of some lack of due diligence or impropriety in the handling of the lease.

Bearing in mind all the while that we agree with the statement of the court as above set forth, that we are not at liberty to go behind the judgment of the United States Court, we do think it proper that this Court have a correct idea of the equities in the case, especially in view of the fact that that seems to be the principal ground upon which the opinion is intended to be based. The oil lease was to expire in a very short time. The price of oil was extremely low. The Wellsville Oil Company had its wells in operation. As its lease was to expire and absolutely terminate without any extension on the date so close at hand, it was to the interest of the Wellsville Oil Company, and at the same time it was entirely within its legal and moral right, for it to extract as much oil as could be extracted from the property by continuous operation. No person familiar with the oil business and its customs would contend otherwise. On the other hand, the price of oil was such that it would be greatly to the interest of the lessor if a portion—and as large a portion of the oil as was possible—should be held in the ground until the price should reach a higher point. It is perfectly manifest that the guardian was acting for the interests of the minor in securing the extension of the lease, in order to avail himself of this privilege, and at the same time the Wellsville Oil Company was acting perfectly within its rights when it pumped the lease with the idea of securing just as much oil as was possible within the term of its lease.

64 It ought to be plain that there was, therefore, no breach of the contract, and no lack of diligence on the part of the

plaintiff in error, and we do not think it likely that it was the intention of this court to go so far as to permit the case to turn upon the question of good faith without the testimony that was before the Master in Chancery and the United States Court, especially in view of the fact that the Master in Chancery and the United States Court having before them the testimony found the equities to lie in favor of the extension of the lease.

The effect of the decision of this court, if it shall stand in its present form, is to set aside a decree of the United States Court, although it has expressly denied that such was its purpose, and although it has assumed for the purposes of this case that the United States Court had jurisdiction to act, and consequently that its findings should stand.

II.

The discussion under the preceding topic disposes of all the matters mentioned in the syllabi of the opinion rendered by the court August 18, 1914, and against which this motion for rehearing is directed, but in the text of the opinion there appears a discussion which we respectfully suggest does not take into consideration the opinion of Justice Williams in the case of Cowles v. Lee, and, although, our contention in this matter is fully presented in the reply brief, we feel that the court has wholly overlooked our contention.

Counsel for the defendant in error was driven in his brief to the necessity of attacking the decision of Morrison et al. v. Burnett, and on page 31 of his brief says:

65 "We cannot omit to express our dissent from the view of the learned court which rendered that decision."

This brief was written July 18, 1912, and the case of Cowles v. Lee was decided Dec. 3, 1912. In the latter case Justice Williams expressly cites, with approval, Morrison et al. v. Burnett, and, as indicated in our reply brief, expressly supports our position. If the language of Justice Williams, as used in his opinion, is subject to any doubt, it seems to us that all doubt is removed by his own language used in one of the syllabi as follows:

"The United States Courts in the Indian Territory sitting as courts of chancery had authority to approve such leases extending beyond the minority of the ward."

Moreover, he holds that such court orders are final.

The lease under consideration in the Cowles case, was on the Departmental form, and was, of course, subject to the approval of the Secretary of the Interior, just as was the Martha Everett lease. The case of Morrison et al. v. Burnett, must, therefore, be regarded as an authority in Oklahoma because it was approved by Justice Williams.

We are now confronted squarely with the question whether Cowles v. Lee is to be overruled, modified or approved in this case. We think we are justified in believing that it is not the intention of the court to overrule Cowles v. Lee, and we feel that in order to avoid certain confusion there should be a rehearing herein.

In conclusion, permit us to suggest that the Court has shown its intention not to overrule Cowles v. Lee, and there follows irresistibly

the conclusion that the United States court had jurisdiction to act, and, in the absence of fraud or mistake in procuring the order (which, of course, is not even claimed by defendant in error) the order of the United States court should stand for what it is worth.

Therefore, the problem of the court in this case is to determine
66 whether the lease of the Wellsville Oil Company, upon its approval by the United States court, became ipso facto a final and binding contract, regardless of the approval of the Secretary of the Interior. The Circuit Court of Appeals unquestionably held such a lease as the one in the case at bar to be valid, and that case has been approved by our own Supreme Court in the case of Cowles v. Lee. The large amount involved in this case, and our firm belief that the Court has overlooked some important considerations, leads us to urge that an opportunity be given for a rehearing.

Respectfully submitted,

JAMES A. VEASEY,
L. A. ROWLAND,
L. G. OWEN,
Attorneys for Plaintiff Error.

Filed Aug. 29, 1914. W. H. L. Campbell, Clerk.

67 And afterward, at the July, 1914, Term of said Supreme Court, on the 22nd day of September, 1914, the following proceeding was had in said cause, to wit:

#3785.

WELLSVILLE OIL CO., Plaintiff in Error,
vs.
MARTHA MILLER et al., Defendants in Error.

And now on this day it is ordered by the court that plaintiff in error be allowed 15 days within which to file brief in support of petition for rehearing.

68 And afterward, at the July, 1914, Term of said Supreme Court, on the 6th day of October, 1914, the following proceeding was had in said cause, to wit:

#3785.

WELLSVILLE OIL CO., Plaintiff in Error,
vs.
MARTHA MILLER, Defendant in Error.

And now on this day it is ordered by the court that plaintiff in error be allowed six days from this date within which to file brief on petition for rehearing.

69 And thereafter, at the October, 1914, Term of said Supreme Court, on the 1st day of December, 1914, the following proceeding was had in said cause, to wit:

#3785.

WELLSVILLE OIL CO.
vs.
MARTHA MILLER et al.

And now on this day it is ordered by the court that oral arguments be heard as to whether or not the petition for rehearing should be granted, on December 7, 1914, in the above entitled causes.

70 And aftereard, at the October, 1914, Term of said Supreme Court, on the 22nd day of December, 1914, the following proceeding was had in said cause, to wit:

#3785.

WELLSVILLE OIL CO., Plaintiff in Error,
vs.
MARTHA MILLER, née Everett, et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein, and petition for rehearing filed.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed, and the former opinion filed herein withdrawn and this opinion substituted therefor, and that a rehearing be denied. Opinion by Galbraith, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

71 Filed Dec. 22, 1914. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Two.

No. 3785.

WELLSVILLE OIL COMPANY, Plaintiff in Error,
vs.
MARTHA MILLER (née Everett), and THE ALPHA OIL COMPANY, Defendants in Error.

Syllabus.

1. Where the alleged cause of action set out in a petition in a suit in equity shows that the right or claim relied upon for relief is based upon a breach of a contractual obligation, existing

between the parties thereto, such plaintiff does not come into court with clean hands, and a general demurrer to the petition for want of equity is well taken and should be sustained.

2. A condition subsequent operates upon estates already created and vested, and render them liable to be defeated; while a condition precedent is one that must be performed before the estate can vest, or be enlarged. A void condition subsequent in a lease contract cannot operate to defeat an estate already vested thereunder, but a void condition precedent prevents any estate from vesting and renders the lease void, unless the condition is performed.

3. In the year 1907, upon the petition of the guardian of a minor, full blood allottee, the United States Court for the Northern District of the Indian Territory, sitting in equity, made an order directing the minor to join in executing an oil and gas mining lease upon the ward's allotment upon condition that the lease should be approved by the Secretary of the Interior. Held, that this condition requiring the approval of the Secretary of the Interior was a condition precedent in the lease contract, and no estate vested thereunder until this condition was performed, although the condition may have been void.

Error from the District Court of Rogers County.

T. L. Brown, Judge.

Action by Wellsville Oil Company against Martha Miller and the Alpha Oil Company. Judgment was for the defendant, the plaintiff appeals. Affirmed.

Jas. A. Veasey, Lloyd A. Rowland, L. G. Owen, Samuel W. Hays, for Plaintiff in Error.

Hurley, Mason & Senior, Tillitson & Elliott, A. C. Hough, W. J. Gregg, for Defendant in Error.

72 Opinion by GALBRAITH, *C.*:

This was a suit in equity commenced by the plaintiff in error against the defendants in error for the purpose of validating an oil and gas lease which it held on eighty acres of Martha Miller's allotment, and to cancel a like lease held on said land by the Alpha Oil Company. There was a demurrer to the petition which was sustained. The plaintiff in error refused to amend and judgment was entered for the defendants in error. To review this judgment the plaintiff in error has perfected an appeal to this court.

The assignments of error are considered in the brief and argument as one, to-wit, that the trial court erred in sustaining the demurrer to the petition.

The petition was in two counts. In the first court it was alleged that the plaintiff originally had an oil and gas mining lease on eighty acres of the allotment of Martha Miller (née Everett) a full blood minor of the Cherokee Nation, which expired with her minority on

March 16th, 1908; that in February, 1907, more than a year before the allottee reached her majority she, by her guardian, filed a petition in the United States District Court for the Northern District of the Indian Territory. It does not appear from the petition, but the record shows that this petition was filed in equity, although the allottee's guardanship case was pending on the probate docket of said court at that time. The allottee asked in this petition that she, by her guardian, be authorized to enter into a new lease with the Wellsville Oil Company for a term of fifteen years, which lease would run fourteen years beyond her minority; that the execution of this new lease was necessary in order to protect her property; that
73 the Wellsville Oil Company, under its lease, had drilled seventeen wells upon her property, fifteen of which were producing oil wells, and that said Company, owing to the shortness of the term to run under its lease, were crowding the pumps and operating the same at full capacity for twenty-four hours each day, and were draining the land of oil; that the price of oil was abnormally low, and that if she was authorized to enter into a new lease this Company would cease its strenuous operation, and she would therefore be saved irreparable loss; that this petition was by the court referred to a Master in Chancery, who took testimony and reported to the court, recommending the new lease as prayed for in the petition; that upon the filing of this report the court made an order authorizing and directing the guardian to join the minor allottee in executing a new oil and gas mining lease to the Wellsville Oil Company, and that in compliance with this order such lease was made, attaching a copy thereof to the petition; that a bonus of $1,600.00, as provided in the lease, had been deposited in the Union Bank & Trust Company, of Chelsea, Indian Territory, and that on the 24th day of July, 1907, the guardian filed his report showing the making of the lease and that the court in all things confirmed the execution of the lease in an order approving the report, a copy of the order being attached to the petition; that the Wellsville Oil Company entered into the possession of the land, tendered the bonus to the minor allottee, and upon her refusal to accept it tendered the same in court for her use and benefit; that the Alpha Oil Company claimed an interest in the land covered by plaintiff's lease by virtue of a lease executed
74 subsequent to the date of the Wellsville Oil Company's new lease; that notwithstanding the condition in the order of the United States District Court authorizing the new lease that it should be approved by the Secretary of the Interior, there was no law to justify this condition, and it was therefore of no legal force and effect; that the order of said court alone made said lease a binding obligation; that the allottee, after she reached her majority, in disregard of her lease to the Wellsville Oil Company approved by the United States Court for the Western District of the Indian Territory, had executed another lease covering the same land to the Alpha Oil Company, and acting under that lease the said Alpha Oil Company had dispossessed the plaintiff and interferred with its development of the land, and further alleging that the defendants were incapable

of responding in damages, and that the plaintiff had no plain, speedy or adequate remedy at law. In the second count it was alleged that on the 18th day of March, 1908, the date upon which the new lease became effective, the plaintiff was in the peaceable possession of the premises, and continued for many months thereafter, when the Alpha Oil Company fraudulently obtained possession of the premises and withheld the same from the plaintiff until July or August, 1910, when it abandoned the lease and the plaintiff thereupon again took possession, and has since been operating the oil lease thereon; that it placed improvements thereon to the amount of $8,000.00 and has expended $2,500.00 in caring for and in the production of oil on said lease, and prays that its new lease may be declared valid and that the defendant be enjoined from interfering with the
75 operation thereof, and that the lease to the Alpha Oil Company be vacated, and that if it be decreed that the plaintiff's lease is not valid it be reimbursed for necessary and proper expenses incurred while operating under its lease, and for the value of the improvements placed on the premises.

The order made on the 7th day of June, 1907, by the United States Court for the Northern District of the Indian Territory sitting in equity, in response to the petition of the guardian filed therein, was as follows:

"Comes now Calvin Everett, guardian of the above named minor, and the matter of the petition of said guardian to be authorized to execute a lease upon the allotment of said minor coming on in its order to be heard, the court being satisfied in the premises from the verified petition of said guardian and the testimony in support thereof, finds:

First. That said minor was born on the 17th day of March, 1890, and that her minority will extend but for the period of about one year and one month.

Second. That on the 5th day of April, 1905, under the proper order of Court, a lease for oil and gas mining purposes was executed on the allotment of said minor to Sidney R. Bartlett and Edward H. Smith, of Independence, Kansas, which said lease has been subsequently assigned to the Wellsville Oil Company, of Wellsville, New York, with the approval of the Secretary of the Interior.

Third. That since the approval of said original lease, said Wellsville Oil Company has drilled seventeen (17) oil wells on the allotment of said minor, all but two of which are producing wells.

Fourth. That owing to the fact that said lease is to endure for such a short time, said Wellsville Oil Company is pumping said producing wells both day and night to such an excessive and unreasonable extent that the greater part of the oil underlying said land will be exhausted by the time said lease terminates.

Fifth. That the price now paid for crude petroleum is so low that it is not to the interest of the estate of said minor to have said oil produced in the quantities now being done but that said oil should be pumped in the usual and normal manner, so that the production from said wells shall extend over a considerable period and said

minor receive the benefit of such advance in price as she may obtain in the case of crude oil.

Sixth. That said Wellsville Oil Company is willing to discontinue the unusual and excessive pumping of oil from said land, provided it receives a lease for oil and gas mining purposes to continue for fifteen years, on the lands of said minor, for which new and ad-
76 ditional lease said Company will pay an additional royalty of two and one — (2½) per cent, or twelve and one-half (12½) per cent in all, and a bonus of Twenty Dollars ($20.00) an acre, which said additional royalty and bonus are reasonable in view of all the circumstances in the case.

Seventh. That the making of a lease on the allotment of said minor under the terms hereinbefore set out would be to the advantage of the estate of said minor and great and irreparable loss would result to said estate, were said proposition not to be accepted.

It is therefore considered, ordered and adjudged by the Court, that Calvin Everett, Guardian of the person and estate of the above named minor, Martha Everett, be and he is hereby authorized and empowered to join with said Martha Everett in the execution of an oil and gas mining lease on the allotment of said Martha Everett, to the Wellsville Oil Company, a corporation of Wellsville, New York, which said lease shall be executed in conformity with the regulations of the Secretary of the Interior, reserve a royalty of twelve and one-half (12½) per cent, continue for fifteen (15) years from its date, and for which lease the guardian shall receive a bonus of Twenty Dollars ($20.00) an acre for the use and benefit of said minor, which said bonus shall be deposited in the Union Bank & Trust Co., of Chelsea, I. T., there to be and remain in escrow until the approval of said lease by the Secretary of the Interior, at which time the same shall be paid to said guardian for the use aforesaid.

It is further ordered and adjudged by the Court, that upon the approval of the lease herein authorized, by the Secretary of the Interior, that the lease hereinbefore authorized by the court and the order of the court authorizing the same, as well as the order of court confirming the same, on April 5th, 1905, stand vacated and be of no further force or effect.

It is further ordered and adjudged by the Court, that said Guardian shall, upon the execution of said lease, make a full report of his doings in connection therewith and that upon receiving said bonus of Twenty Dollars an acre, that he execute to the United States of America an additional bond in the sum of Thirty two Hundred Dollars, conditioned for the faithful accounting of the proceeds of said lease."

On the 24th day of July, following, the court made a further order concerning the lease.

"On the 24th day of July, 1907, comes on to be heard the report of Calvin Everett, Guardian and next Friend of Martha Everett, relative to leasing the lands of said minor unto the Wellsville Oil Company and the court being sufficiently advised finds that the said guardian has fully complied with the court's order in the execution of such lease and that he has filed a bond in the sum of Three

Thousand Two Hundred Dollars, ($3200.00) conditioned as required by law.

It is therefore ordered; That said lease and said bond be and they are hereby approved, ratified and confirmed.

Done at Nowata in Open Court."

77 In pursuance to the order of June 7th, above set out, the guardian and ward joined in executing a lease for the term of fifteen years. This lease was on a form prescribed by the Secretary of the Interior for oil and gas leases on restricted Indian lands, and contained all of the usual recitals, giving the Secretary direction and control of the development to be made thereunder, and this lease was submitted in regular order for the approval of the Secretary as provided in the court's order above set out. This appears from the following endorsements thereon:

"Department of the Interior,

U. S. Indian Service.

Union Agency.

MUSKOGEE, IND. T., Oct. 3, 1907.

The Within lease is forwarded to the Commissioner of Indian Affairs with *rep* commendation that it be approved. See my report of even date.

——— ———.

Department of the Interior.

Office of Indian Affairs.

WASHINGTON, D. C., Oct. 22, 1907.

Respectful-y submitted to the Secretary of the Interior with recommendation that it be approved subject to regulations of June 11, 1907, as amended October 14, 1907, and Department letter of September 26, 1907 (5-34).

C. F. LARRABEE,
Acting Commissioner.

Department of the Interior.

WASHINGTON, D. C., Nov. 6, 1907.

Disapproved.

JESSE E. WILSON,
Assistant Secretary of the Interior."

It is contended by the plaintiff in error that the United States Court for the Northern District of the Indian Territory, sitting in equity, had jurisdiction to make the order above set out, authorizing

the guardian to execute this new lease, extending beyond the minority of the allottee, and that the order made approving the lease made it a legal and binding obligation without the approval of the Secretary of the Interior. Upon thorough investigation of the au-
thorities we seriously doubt the jurisdiction of that court in
78 equity to make the above order, for the reason, first, we know of no statute conferring the jurisdiction, and, second, for the reason there was no necessity to apply to the Chancellor in this instant, since that court had jurisdiction of the guardianship of this minor allottee, and the management of her estate, in the probate cause pending before it, and no good reason appears why the guardian should not have invoked the court's probate jurisdiction in the guardianship case for authority to execute the same, and for the further reason that Sec. 20 of the Act of Congress of April 26, 1906, conferring power upon the United States Courts in the Indian Territory to provide for leasing the allotments of minors and incompetents was not an act removing restrictions and did not take away from the Secretary of the Interior control over the alienation of the lands of adult full bloods. However, in as much as this court, in Cowles v. Lee, et al., 35 Okla., 159, has used language that might be interpreted to mean that in the opinion of this court the power of that court to make the order was in chancery as well as in probate, we will assume for the purpose of this case that the court had the jurisdiction contended for by the plaintiff in such a case properly brought before it.

2. The first question presented by the demurrer to the petition and raised by the assignments under consideration is, were there sufficient equities stated in the petition to justify the court in granting the relief prayed for? If a negative answer is returned to this question, the ruling of the trial court complained of was correct, and should be sustained. It will be observed that the cause of action in the instant case is based wholly upon the pleadings, orders and
judgment of the United States Court for the Indian Territory
79 relied upon as authority for the plaintiff's in error lease involved in this case. All these are set out and made a part of the petition in the instant case, and their construction thereby invited. A consideration of the power of the court to make the order and decree relied upon as authorizing the lease is necessarily involved in answering the question above suggested.

It is contended by the defendant in error that the plaintiff in error does not come into court with clean hands, and for that reason was properly denied relief in the trial court.

Mr. Pomeroy, in his Equity Juris. Vol. 1, par. 397, says:

"On the other hand, the maxim now under consideration, he who comes into equity must come with clean hands, is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject matter or transaction in question. It says that whenever a party, who, as actor, seeks to set the judicial machinery

in motion and obtain some remedy, has violated conscience or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy."

And in paragraph 398, this author says:

"Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction of those rules, while it could act upon the conscience of a defendant and force him to do right and justice, it would never thus interfere on behalf of the plaintiff whose own conduct in connection with the same matter or transaction has been unconscientious or unjust, or marked by want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no
80 less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, He who comes into a court of equity must come with clean hands; and although not a source of any distinctive doctrines, it furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of remedies and remedial rights."

Judge Sanborn, in rendering the opinion of the Circuit Court of Appeals, in the Michigan Pipe Co., et al., v. Fremont Ditch, Pipe Line & Resevoir Co., et al., 111 Fed., 284, at 287, said:

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligation of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion,—not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands,' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a def dant, to compel him to do that which is just and right, it repels rom its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. 1 Pom. Eq. Jur. 397, 398, 400; Medicine Co., v. Wood, 108

U. S. 218, 227; 2 Sup. Ct. 436, 27 L. ed. 706; Marble Co., v. Ripley, 10 Wall. 339, 357, 19 L. ed. 955."

It seems under the allegations of the petition and the findings of the court on the order of June 7th, that the guardian and the minor allottee were drivrn into court with the petition for authority to make the new lease by reason of the manner in which the Wellsville Oil Company was operating its first lease. The court finding on this point that its manner of operating was "to such an excessive and unreasonable extent that the greater part of the oil underlying said land will be exhausted by the time the lease terminated," and that "the unusual and excessive pumping would result in great and irreparable loss to the estate." It seems from these findings that
81 the plaintiff in error "was wanting in good faith, honesty, and righteous dealing," and that it had breached its duty and violated its contract obligation, and thereby forced the guardian to petition for authority to make the new lease.

It was said by Mr. Justice Van Devanter, in rendering the opinion of the Circuit Court of Appeals, in Brewster v. Lanyon, Zinc Co., 140 Fed., 801, in regard to the mutual obligations assumed in an oil lease:

"In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which, the exploration and development shall proceed. * * * The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule of all other contracts where the time, mode, or quality of performance is not specified, and no reason is preceived why it should not be equally applicable to oil and gas leases."

And, again, in the course of the same opinion, it is said:

Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required. A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence, which, as before shown, is also made a condition of the lease under consideration."

It follows from this rule that a plain and substantial disregard of its duty to operate the lease in such a manner as would be reasonably expected of operators of ordinary prudence, having reÀard to the interests of both the lessor and lessee, would be a breach of its contract and that this obligation might
82 be violated as much by a too strenuous as by a too dilatory operation of the lease. Both the petition of guardian and the order of the court show a flagrant violation of this duty in the manner of operating the first lease. Then it seems that the ground upon which the Wellsville Oil Company forced the guardian and the allottee into a court of equity to obtain the authority for executing a new lease was a breach of its plain

obligation to the minor allottee under its first lease with her. This being true the plaintiff in error does not appeal to the conscience of the Chancellor with "clean hands," and cannot invoke the powers of a court of equity for its relief. The very right of action set out in the first count of the petition in the instant case is based upon the breach of duty, the wrongful operation of the first lease, its own iniquity. The principle that no one can take advantage of his own wrong, much less found a right of action thereon, is as old as jurisprudence itself. "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." The record shows that the plaintiff not only came into court with unclea- hands, but had been guilty of iniquity as well, and the trial court properly denied it relief.

3. Again, in the court's order authorizing the lease to be made, it is provided that the guardian, "be, and he is hereby authorized and empowered to join with the said Martha Everett in the execution of an oil and gas mining lease on the allotment of said Martha Everett, to the Wellsville Oil Company * * * which said lease shall be executed in conformity with the regulations of the Secretary of the Interior, reserve a royalty * * * and for which lease the guardian shall receive a bonus of Twenty ($20.00) Dollars
83 an acre * * * which said bonus shall be deposited in the Union Bank & Trust Co., of Chelsea, I. T., there to be and remain in escrow until the approval of said lease by the Secretary of the Interior, at which time the same shall be paid to said guardian for the use aforesaid." The order further provided "that upon the approval of the lease herein authorized, by the Secretary of the Interior" the present lease under which the allottee held the premises should be vacated, and also that said "guardian shall upon the execution of said lease, make a full report of his doings in connection therewith and that upon receiving said bonus of Twenty Dollars an acre, that he execute to the United States of America an additional bond in the sum of Thirty Two Hundred Dollars, conditioned for the faithful accounting of the proceeds of said lease."

We cannot agree with the contention of the plaintiff in error that this provision in the order authorizing the lease providing that it should be subject to the approval of the Secretary of the Interior, and should be executed in accordance with the rules and regulations prescribed by him, and directing the guardian to make a full report when the order had been complied with, and providing for the bonus to be placed in escrow in the bank until the Secretary had approved the lease, were mere idle and useless provisions. We rather think that they had a fixed and set purpose understood by the court and the parties at that time, and that the provision requiring the approval of the Secretary of the Interior was intended as a condition precedent to be complied with in order to complete the execution of the lease contract, and that no- having been complied with the contract was not complete and no estate vested in the lessee there-
84 under.

In Blackstone, Book 2, page 157, following a discussion of conditions subsequent, it is said:

"But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed."

Chancellor Kent, in Book 4, at page 125, says in regard to this condition:

"These conditions are also either precedent or subsequent; and as there are no technical words to distinguish them, it follows that whether they be the one or the other, is matter of construction, and depends upon the intention of the party creating the estate. A precedent condition is one which must take place before the estate can vest, or be enlarged; as if a lease made to B. for a year, to commence from the first day of May thereafter, upon condition that B. pay a certain sum of money within the time; or if an estate for life be limited to A. upon his marriage with B. here the payment of the money in the one case and the marriage on the other, are precedent conditions, and until the condition be performed, the estate cannot be claimed or vest. Precedent conditions must be literally performed and even a court of chancery will never vest an estate, when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed."

As to the rule of construction the same authority, at page 133, says:

"Whether the words amount to a condition, or a limition, or a covenant, may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy; though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will after all depend less upon the artificial rules than upon the application of good sense and sound equity to the subject and spirit of the contract in the given case."

Mr. Hargrave, in argument in the case of Scott v. Tylor, 29 Eng. Rep. (Full reprint) at page 253, said:

"The condition precedent is of quite an opposite nature, there the estate cannot commence until the condition is performed, or the contingency has happened. * * * A passage in Plowden, con-
veys an idea of the dependent nature of the estate on such a
85 condition. Judge Brown says, Plowd. 272, 'If I grant to you
that if you will do such a thing, you shall have a lease in such particular land of mine; there the condition precedes the lease, as the needle precedes the thread; and, as the needle draws the thread after it, does the condition the lease.' The condition, therefore, is beneficial, not penal, and is favoured and benignantly interpreted, according to the intention of the words, Co. Lit. 218 *a*. 219 *b*.; * * * therefore, though the condition be impossible

or illegal, no estate can arise, and it is the same as if none had been given, Co. Lit. 206 *a* and *b*, 217 *b*, 218 *a*; Fulbeck's Par. 2, part. 67 *a*. The result is, that, although penal conditions to destroy estates may be dispenced with, beneficial conditions to raise estates must always be complied with.

If this doctrine is important at law, it essentially affects the jurisdiction of equity; from the penal nature of the conditions subsequent, they, in general, fall within that lenient principle by which courts of equity relieve against penalties: but there is no connection between this and a condition precedent, which operates by giving an estate and conferring a benefit. Upon such a condition, equity cannot interpose; equity cannot raise an estate which the doner has not given. If such a power was to be assumed over one subject, it might soon extend over the others and over-leap all boundaries."

These authorities, we consider, justify the conclusion that the provisions in the order requiring the approval of the lease by the Secretary of the Interior interpretel according to the rules of common sense, and considering the circumstances surrounding the court and the parties at the time it was made, must be held to be a condition precedent, and it was placed in the order with the purpose and intent that the lease should not be complete or effective without the approval of the Secretary of the Interior. This is true notwithstanding the fact that the Secretary of the Interior had, at that time, no legal authority to approve or disapprove the lease. Morrison v. Burnett, 154 Fed. 617. For that reason the condition was void, but having been made a condition precedent in the court's order, authorizing the lease, no estate vested until this condition was complied with.

Much reliance is placed upon the case of Morrison v. Burnett, supra, wherein the Circuit Court of Appeals, in construing Sec. 20 of the Act of April 26, 1906, held that the proviso therein
86 contained as follows: "provided that allotments of minors and incompetents may be rented or leased under order of the proper court," taken in connection with the provisions of the Act of July 28, 1904, conferring "full and complete jurisdiction" upon district courts in the Indian Territory dispensed with the approval of the Secretary of the Interior to mining leases on Indian lands, and that after the passage of the Act of April 26, 1906, the Secretary had no further authority to approve such leases, but full and complete authority to do so conferred upon the United States Courts in the Indian Territory.

The conclusion we have reached in this case is not in conflict with the decision in Morrison v. Burnett, supra. The distinction between a condition subsequent and a condition precedent marks the distinction between these cases. In the former the estate vests before the condition is to be performed, and where void the condition cannot operate to divest the estate, while in the latter the performance of the condition precedes the vesting of the estate, and where the condition is void no estate vests.

In the instant case the condition requiring the approval of the

lease by the Secretary was written in the order authorizing the lease and was a condition precedent, while in the Morrison case the master advertised and sold the lease containing a condition for its approval by the Secretary, and the court approved the report of the master, and the condition requiring the Secretary's approval to that lease was to be obtained later, and was, therefore, a condition subsequent. The court, in that case, held that the condition was void, for want of authority in the Secretary to approve the lease, as provided in the condition. The estate, however, under that lease had vested and the condition subsequent, although void, was not grounds for forfeiture.

87 4. We cannot agree with the contention made that the plaintiff in error was compelled by "duress" to accept this condition as the Secretary of the Interior was claiming authority to approve such leases, and the court was conceding it, and it could not have obtained the order for the lease without this condition. It is doubtless true that the court would not have made the order without this condition incorporated in it. This fact instead of supporting the claim of duress tends to confirm the finding herein above name- that this condition was knowingly and purposely written in the order and that it was intended by the court and understood by the lessee to be a condition precedent. At any rate the plaintiff in error cannot escape the consequences of failure to comply with it on the ground of duress. There is nothing in the record to show duress. It does not appear that this provision was even objected to at the time the order was made. In fact, there is evidence in the record that would possibly justify the inference that the attorney for the plaintiff in error prepared this order with this condition in it and presented it to the court for his signature.

5. Again, the order of July 24th, cannot be given the force contended for by the plaintiff in error. It is not clear that the court was not imposed upon and induced to make this order through mistake of fact; that the order of June 7th, had been fully complied with and the approval of the Secretary of the Interior to the lease had been secured. It will be remembered that the lease was directed to be executed under the rules and regulations of the Secretary of the Interior, and the bonus money was directed to be placed in

88 escrow until the Secretary had approved the lease, and then delivered to the guardian and the guardian was directed to execute an additional bond for Thirty Two Hundred Dollars when he received the bonus money, and when all these things had been done the order directed the guardian to make a "full report" to the court. The guardian made a report on or prior to July 24th. What he reported does not appear for his report is not included in the record. It does appear from this order of July 24th, that he had filed the additional bond for Thirty Two Hundred Dollars, and though he was not directed to do this until after the lease had been approved by the Secretary of the Interior, this fact tends to show that the guardian reported to the court that he had fully complied with the order authorizing the lease. These things justify the inference that either the court was mislead and deceived by the report

of the guardian, and led to make the order of July 24th, under a misapprehension of the facts, or that he considered that this order was one of the necessary steps to be taken in the completion of the lease. The fact that the lessee subsequent to July 24th, proceeded in its attempt to secure the approval of the lease by the Secretary of the Interior, having previously filed the same with the Commissioner to the Five Civilized Tribes, and caused it to be forwarded to the Secretary for his approval, would indicate that the lessee regarded this order of July 24th as one of the necessary steps to be taken in perfecting the lease. There is nothing in this order to indicate any purpose on the part of the court to vacate or set aside the condition, requiring the approval of the Secretary of the Interior, in the order of June 7th, and we are constrained to decline to give it such effect.

We, therefore, conclude that the demurrer was well taken to the first cause of action on the grounds that the facts set out
89 were not sufficient to justify the chancellor in granting equitable relief, in as much as the plaintiff did not come into court with clean hands and had failed to comply with a condition precedent upon which the lease was authorized, namely, had not secured the approval of the Secretary of the Interior. We are equally certain that the demurrer was good as to the second cause of action in which the claim was made for compensation for expenses in operating the lease and for improvements placed on the premises. The plaintiff is in possession. It invokes the jurisdiction of equity to have the lease under which it is claiming declared valid and the lease of the Alpha Oil Company declared invalid. It may be that the plaintiff in error could not be dispossessed without being compensated in a manner and as it claims it should be, but that cannot be done in this suit. The facts alleged in the two counts were not sufficient to justify the court in granting the relief prayed for, or in fact any relief. The trial court was right in sustaining the demurrer.

We recommend that the exception be overruled and that the judgment appealed from be affirmed, and that the former opinion filed herein be withdrawn and this substituted therefor, and that a rehearing be denied.

Per curium: Adopted in whole.

Dec. 21, 1914.

By the Court: Adopted in whole.

90 Filed Jan. 27, 1915. William M. Franklin, Clerk.

Petition in Error.

In the Supreme Court of the State of Oklahoma.

No. 7117.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff in Error,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants in Error.

The Plaintiff in error, Wellsville Oil Company, complains of the defendants in error, Martha Miller, née Everett and Alpha Oil Company, a corporation, in this, to wit:

That on the 8th day of January, 1915, the District Court for Rogers County, Oklahoma, made and entered a judgment, which is found on pages 117, 118, 119 and 120 of the case made which is made part hereof, marked "Exhibit A."

It complains that the court erred in making an order that the Clerk of said Court should pay over to the defendants the sum of Twelve Thousand, Eight Hundred Eighty Dollars ($12,880.00) which sum was in the hands of the Clerk of said Court under a former judgment and stipulation, to be held until the ownership thereof was determined, and says that the Court ordered said money
91 paid by the Clerk to the defendants before the ownership of said fund had been determined by any trial, or had been put in issue by any pleadings.

It further complains that an order was made that Eight Thousand, Four Hundred Forty-five Dollars and Thirty-eight cents ($8,445.38) in the hands of the Prairie Oil & Gas Company, be paid over to the defendants, when the ownership of said fund was not in issue by any pleading and no trial or determination of the ownership had been had.

It further complains that the Court adjudged the defendants entitled to possession of certain lands, subject to an oil and gas mining lease made by Martha Miller to the Alpha Oil Company, when the right of possession had not been tried or put in issue, when the ownership of the lease to the Alpha Oil Company, or its validity, had not been tried, or put in issue in behalf of the defendants, and when the right of possession had not been tried by a jury and a jury had not been waived.

The Court further erred in refusing to permit the plaintiff to supersede said judgment and stay the execution thereof, when the plaintiff offered, in open court, to execute a bond of more than double the amount of the matter in controversy and offered to execute a bond in the sum of Fifty Thousand Dollars ($50,000.00).

The Court further erred in refusing the plaintiff in error's re-

quest to grant it time to apply to the Supreme Court for a stay of the execution of the judgment and for a supersedeas bond.

92 The Court further erred in rendering said entire judgment, because the Court had no jurisdiction over the plaintiff in error for said purpose, and no jurisdiction to render its said judgment which was rendered.

Wherefore, The Plaintiff in error prays that the judgment so rendered be reversed, set aside and held for naught, and that all rights which it has lost by the rendition of said judgment may be restored, and for such other relief as to the Court may seem just.

WELLSVILLE OIL COMPANY,
Plaintiff in Error,
By SHERMAN, VEASEY & O'MEARA,
Its Attorneys.

93 In the Supreme Court of the State of Oklahoma.

Appealed from the District Court in and for Rogers County, State of Oklahoma.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff, Plaintiff in Error,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendant, Defendants in Error.

Appeal from Order on Supreme Court Mandate.

Appearances: Tillotson & Elliott and W. J. Gregg, for Defendants in error, and Sherman, Veasey & O'Meara, for Plaintiff in error.

Before T. L. Brown, Judge.

Case Made.

District Court, Claremore, Rogers County, State of Oklahoma. Filed Jan. 22, 1915.

C. T. McCLELLAN,
Court Clerk.

Filed Jan. 27, 1915, William M. Franklin, Clerk.

94 In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Be it remembered that heretofore, to wit, on the 6th day of September, 1911, an action was duly commenced by the plaintiff herein against the defendants herein by the filing by the plaintiff in the office of the Clerk of the District Court in and for said county and state, of a petition, and which said petition is in words and figures as follows, to wit:

95 NOTE.—Pages 3 to 43 both inclusive are omitted from the transcript in this case, (No. 7117) for the reason that the same pages appear in the transcript in case No. 3785, and are omitted from this case at the request of the attorneys of record, Sherman, Veasey & O'Meara.

96 Office of the Clerk of the Supreme Court, Oklahoma City, Oklahoma.

WELLSVILLE OIL CO., Plaintiff in Error,
vs.
MARTHA MILLER et al., Defendants in Error.

I hereby certify that on the 6 day of April, 1912, there was filed in my office a petition in error and case made from transcript of the record of the Dist. Court of Rogers County, cash deposit of $10.00 and — summons in error, in the above entitled cause; that said case was duly entered on the docket numbered 3785 and is pending in the Supreme Court, and that summons in error was issued herein on the — day of ——, 191-, to —— County.

Witness my hand and the seal of said Court, at Oklahoma City, this 6 day of April, 1912.

[SEAL.]

W. H. L. CAMPBELL, *Clerk*,
By T. H. STURGEON, *Deputy*.

Endorsed: Certificate of Appeal, Supreme Court of Oklahoma, District *Clerk*, Claremore, Rogers County, State of Oklahoma. Filed Apr. 13, 1912, (Signed) Lee Settle, District Clerk.

97 (Filed Dec. 28, 1914. Wm. M. Franklin, Clerk.)

In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division Number Two.

No. 3785.

WELLSVILLE OIL COMPANY, Plaintiff in Error,
vs.
MARTHA MILLER (née Everett) and THE ALPHA OIL COMPANY, Defendants in Error.

Syllabus.

1. Where the alleged cause of action set out in a petition in a suit in equity shows that the right or claim relied upon for relief is based upon a breach of a contractual obligation, existing between the parties thereto, such plaintiff does not come into court with clean hands, and a general demurrer to the petition for want of equity is well taken and should be sustained.

2. A condition subsequent operates upon estates already created and vested, and render- them liable to be defeated; while a condition precedent is one that must be performed before the estate can vest, or be enlarged. A void condition subsequent in a lease contract cannot operate to defeat an estate already vested thereunder, but a void condition precedent prevents and estate from vesting and renders the lease void, unless the condition is performed.

3. In the year 1907, upon the petition of the guardian of a minor, full blood, allottee, the United States Court for the Northern
98 District of the Indian Territory, sitting in equity, made an order directing the minor to join in executing an oil and gas mining lease upon the ward's allotment upon condition that the lease should be approved by the Secretary of the Interior. Held, that this condition requiring the approval of the Secretary of the Interior was a condition precedent in the lease contract, and no estate vested thereunder until this condition was performed, although the condition may have been void.

Error from the District Court of Rogers County.

T. L. Brown, Judge.

Affirmed.

Jas. A. Veasey, Lloyd A. Rowland, L. G. Owen, Samuel W. Hays, for Plaintiff in error.

Hurley, Mason & Senior, Tillotson & Elliott, A. C. Hough, W. J. Gregg, for Defendant- in error.

I, William M. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and complete copy of the syllabus of the opinion of said court in the above entitled cause, as the same remains on file in my office.

In witness whereof I hereunto set my hand and affix the seal of said court, at Oklahoma City, this the 24 day of December, 1914.

(Signed) WILLIAM M. FRANKLIN, *Clerk*,
" By JESSIE PARDOE, *Deputy*.

[SEAL.]

Endorsed: Filed Dec. 24, 1914. (Signed) C. T. McClellan, District Clerk by E. C. Feland, Deputy.

99 Be it remembered, that thereafter, to wit, on the 24th day of December, 1914, the mandate of the Supreme Court of the State of Oklahoma, in said cause upon motion of counsel for the defendant, was ordered filed, and was spread of record in said cause by the Clerk of the District Court of Rogers County, Oklahoma, said mandate being in the following words and figures, to wit:

100 *Mandate.*

STATE OF OKLAHOMA,
Supreme Court, ss:

No. 3785.

WELLSVILLE OIL COMPANY, Plaintiff in Error,
vs.
MARTHA MILLER (née Everett) and THE ALPHA OIL COMPANY, Defendants in Error.

The Supreme Court of Oklahoma to the Honorable Judge of the District Court of Rogers County, in said State of Oklahoma:

Whereas, the Supreme Court of the State of Oklahoma, did at the Oct. 1914 term hereof, on the 22nd day of December, 1914, render an opinion in the above entitled cause, appealed from the District Court of Rogers County, Holding:

"That the exception be overruled and that the judgment appealed from be affirmed, and that the former opinion filed herein be withdrawn and this substituted therefor, and that a rehearing be denied."

Now, therefore, you are hereby commanded to cause this order to be shown of record in your court, and take such other and further proceedings herein as shall accord with said order and right and justice in the premises.

Am't costs paid by Dft. in error $2.25.

Witness the Honorable M. J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, at the City of Oklahoma, this 24 day of December, 1914.

(Signed WM. M. FRANKLIN, *Clerk*,
[SEAL.] By JESSIE PARDOE, *Deputy*.

Endorsed: #930 Civil. No. 3785. In the Supreme Court. Wellsville Oil Company, Plaintiff in error, vs. Martha Miller et al., Defendant in error. Mandate—Filed Dec. 24, 1914 (Signed) C. T. McClellan, District Clerk by E. C. Feland, Deputy.

101 And be it remembered that upon the minutes of the clerk of the District Court in and for Rogers County, State of Oklahoma, there appears the following entry.

Jan. 2, 1915.

Court met pursuant to adjournment at 9 o'clock A. M. Jan. 2nd, 1915. Present and presiding: The Hon. T. L. Brown, Judge, C. T. McClellan, Clerk, Hiram Stephens, Sheriff and W. M. Hall, County Attorney. Court having been opened in due form, the following proceedings were had.

102 In the District Court Within and for the Second Judicial District, County of Rogers, State of Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, Plaintiff,
vs.
MARTHA MARTIN et al., Defendants.

Be it remembered that on this 2nd day of January, A. D. 1915, same being one of the regular judicial days of the December, 1914, term of said court within and for said county and state, court met pursuant to adjournment, at which time in open court appeared J. A. Tillotson, of the firm of Tillotson & Elliott, representing the defendant, Martha Miller, whereupon the following proceedings were had:

By Mr. O'Meara (of the firm of Sherman, Veasey and O'Meara), to the reporter: Let the record show I am appearing specially for the Wellsville Oil Company.

By Mr. Tillotson, to the court: If the court please, it is not necessary I take it for me to go through the history of this case because the court tried it or heard it a number of times before it was appealed. The case had gone to the Supreme Court and the mandate was sent back by the Supreme Court to this court and filed. Now here is the order that they appealed from. On this 5th day of December, 1911, comes on to be heard the demurrer in the above entitled cause filed by the defendants herein, the plaintiff appearing by its attorneys, Veasey and Rowland, and the defendant Alpha Oil Compay appearing by its attorneys, P. S. Hurley, and the defendant Martha Miller by her attorneys, Tillotson, Elliott and J. P. Hurley. And all parties announcing ready for the consideration of said demurrer, the court considers the same after argument and finds that said demurrer should be sustained; to which ruling of the
103 court the plaintiff then and there excepted. Whereupon the plaintiff elected to stand upon its amended petition, and on

motion of defendants the court renders judgment in favor of the defendants and said cause is dismissed and the temporary injunction issued herein is dissolved. Then a further stipulation is this: Thereupon counsel in open court stipulated that the custody of the leasehold involved in this suit should remain in the plaintiff until the final adjudication hereof, and that the moneys derived from the property should be paid by the purchasing pipe line into the custody of the Clerk of the District Court of Rogers County, Oklahoma, to be by him deposited in some State Bank within the State of Oklahoma, and the filing of a supersedeas bond herein is waived.

It was further stipulated that the status of the property and of the parties shall remain the same until the final adjudication thereof. The foregoing stipulation is approved by the court and made a part of the final judgment herein.

Now they appealed from that and we have a copy of the syllabus of the court, together with the mandate, certified copy of the syllabus and the mandate which came back and which says this: Whereas, the Supreme Court of the State of Oklahoma did at the October 1914 term -hereof, on the 22nd day of December 191r render an opinion in the above entitled cause, appealed from the District Court of Rogers County, Holding, "that the exception be overruled and that the judgment appealed from be affirmed, and that the former opinion filed herein be withdrawn and this substituted therefor, and that a rehearing be denied." Now, therefore, you are hereby commanded to cause this order to be shown of record in your court, and take such other and further proceedings herein as shall accord with said order and right and justice in the premises.

Now, your Honor, we claim that all this court has to do now is to enforce the judgment of this court. There is a judg-
104 ment of this court rendered here before the case was ever appealed.

By the Court: What is the judgment?

By counsel for the defendant: What is that?

By the Court: Have you the judgment there?

By Mr. Tillotson: Why yes, I just read it a moment ago. It is this journal entry.

By the Court: Oh yes, that was the judgment of this court.

By Mr. Tillotson: Yes sir—Now the Supreme Court affirms that judgment and all there is to do from our viewpoint is for this court to carry out the mandate and in carrying that out we ask the court now in line with the mandate of the Supreme Court to put Martha Miller in possession of that property and we say that that property is in the custody of this court and the court has a right to do it because we stipulated that it should remain only in the possession of the plaintiff until this case was finally determined and if it was determined in our favor, then the court should make such orders in regard to the possession as he saw fit at the time. In other words, give it to whom is entitled to it. If it was decided against us, then we come back and answer and try the case on its merits.

By the Court: Let me ask you a question. They filed a petition and you filed a demurrer:

By Mr. Tillotson: Yes sir.

105 By the Court: You never did file any answer or cross bill, did you?

By Mr. Tillotson: No sir, they filed a petition and we filed a demurrer—I am not sure whether the demurrer was sustained or not or whether they confessed it, but anyway, they filed an amended petition and the demurrer was filed to the amended petition, and upon a final hearing of that, it was sustained.

By the Court: Well, that went to their cause of action I presume?

By Mr. Tillotson: Yes sir.

By the Court: And the Court sustained your demurrer?

By Mr. Tillotson: Here is what the court did—I will read that again—(Reading from paper) 'And all the parties announcing ready for the consideration of said demurrer, the court considers the same after argument and finds that said demurrer should be sustained, to which ruling of the court the plaintiff then and there excepted. Whereupon the plaintiff elected to stand upon its amended petition, and on motion of defendants the court renders judgment in favor of the defendants and said cause is dismissed and the temporary injunction issued herein is dissolved.'

By the Court: Now what was that judgment.

By Mr. Tillotson: Judgment in favor of the defendants and against the plaintiff, judgment sustaining the demurrer of the defendants, judgment dissolving the restraining order the court had issued before that time and a judgment by the court that the

106 property, not only that the lease, bu- the moneys should remain in the hands of the court and the property in the hands of the plaintiff until the final termination of this suit. That was the judgment of this court. We also entered into a stipulation and the court made that a part of his judgment, in these words. (Reading from paper) 'The following stipulation is approved by the court and made a part of the final judgment herein.' You made a final judgment this property should remain in the hands of the plaintiff at least until the final judgment in these words. (Reading from paper) 'Thereupon counsel in open court stipulated that the custody of the lease hold involved in this suit should remain in the plaintiff until the final adjudication hereof'; Now that is your judgment until then and only then. (Reading from paper further) 'It is further stipulated that the status of the property and of the parties shall remain the same until the final adjudication hereof." Now that is the judgment of this court and that is our stipulation and the court says—(Reading from paper) 'The foregoing stipulation is approved by the court and made a part of the final judgment herein.

Now I have a brief here on this proposition. We say now that this mandate has come back here and it is the duty of the court without any formal motion on our part, to proceed to carry out the conditions and provisions of that mandate and that order.

By the Court—To counsel for defendant: Have you the decision of the Supreme Court?

By Mr. Tillotson: Well, I have the syllabus of the Supreme Court.

By the Court: You have not read the opinion?

By Mr. Tillotson: No, sir, the syllabus always comes back
107 with the mandate and the syllabus is the law of the case—the opinion is not. Under our practice, the syllabus is the law of the case.

By Mr. O'Meara: I don't think the opinion has come down. The mandate and the syllabus is here.

By Mr. Tillotson: Yes sir, and the syllabus is the law of the case. The court gets together and agrees on it and here is what that is. (Reading from paper) 'Where the alleged cause of action set out in a petition in a suit in equity shows that the right or claim relied upon for relief is based upon a breach of a contractual obligation, existing between the parties thereto, such plaintiff does not come into court with clean hands, and a general demurrer to the petition for want of equity is well taken and should be sustained.'

'A condition subsequent operated upon estates already created and vested, and under them liable to be defeated; while a condition precedent is one that must be performed before the estate can vest, or be enlarged. A void condition subsequent in a lease contract cannot operate to defeat an estate already vested thereunder, but a void condition precedent prevents any estate from vesting and renders the lease void, unless the condition is performed.'

'In the year 1907, upon the petition of the guardian of a minor, full blood, allottee, the United States Court for the Northern District of the Indian Territory, sitting in equity made an order directing the minor to join in executing an oil and gas
108 mining lease upon the ward's allotment upon condition that the lease should be approved by the Secretary of the Interior.'

'Held, that this condition requiring the approval of the Secretary of the Interior was a condition precedent in the lease contract, and no estate vested thereunder until this condition was performed, although the condition may have been void.'

I omitted the caption. It is entitled in this case, "In the Supreme Court" (Interrupted by the court).

By the Court: Let me see that again please.

(Mr. Tillotson here hands the syllabus to the court for the court's persual.)

By the Court (after reading syllabus): All right.

By Mr. Tillotson: Now then, we have a decision of the United States Supreme Court in that Eastern Cherokee case to the effect that when a case has been once decided (reading from paper) 'by this court on appeal and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. The court cannot vary it, or examine it, for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded.'

109 Now, we have a lengthy brief here Your Honor if you desire to hear some of the authorities along the line of the

distribution of the property and we have a decision of our own Supreme Court that settles the power of this court to act, and it is 113 Pacific at page 1058. (Quoting from paper) 'Whereafter a decision of a case and rendition of an opinion in this court its mandate is regularly transmitted to the trial court and is spread upon its records, this court in the absence of fraud, accident, inadvertence or mistake is without jurisdiction to recall the mandate and entertain a petition for rehearing and a motion for leave to file same will be denied.'

Now it is back here in this court. This appeal merely suspended the operation of the judgment in this court pending that appeal and when that decision was affirmed, or the judgment of this court was affirmed, and that is this (indicating paper) journal entry right here, this judgment became effective the minute that that mandate is filed here and it is not necessary for this court to render another judgment because there is already one rendered and on record in this office and which has been affirmed by the higher court and it immediately attaches and the appeal or affirmance brings it back in this court. Now we had a judgment that this property was to remain in their possession until this was finally settled and that has been done and the mandate is back in this court, for you to take such action as you see fit. Now we have dozens and dozens of authorities along that line as to the distribution of the money. Now the petition alleges, upon which this action is
110 based, that this land belongs to Martha Miller; it alleges that there is between twelve and thirteen thousand dollars in money produced from the sale of oil and from the premises belonging to Martha Miller, upon which they claim their lease, showing that Martha Miller owns this land and that the oil was produced from her land. Now this court and the Supreme Court has held that the Wellsville Oil Company has no interest whatever in that, and the property was only to remain in their possession until that matter was finally adjudicated. This has been decided and now it is up to Your Honor to give Martha Miller possession of the premises and the possession of the money that has accumulated.

By the Court: I fully agree with you on everything except one. I don't know about that because I don't understand it. I appreciate the fact that this *could* would not do a thing in the world except what the Supreme Court said to do.

By Mr. Tillotson: Yes sir.

By the Court (continuing): And the question before this court is the same as the Supreme Court and if they enlarged on that when they sent it back, that would be the judgment of this court.

By Mr. Tillotson: Now let's see what the authorities say on it. Now here is an Oklahoma case (reading from paper) 'This is an action of mandatory injunction from the District Court of Kay County, and comes here a second time on appeal, having been considered by this court at the January 1901 term, and in the
111 opinion then handed down the trial court was directed to enter a certain judgment. When the mandate from this court reached the court below, the plaintiff presented an amended

petition, setting up facts which occurred prior to the trial of the original case appealed to this court and asked leave to file the same, and to be permitted to litigate the additional matter set up in such amended petition. The plaintiff's application to amend was denied. Why? Because this court had no authority whatever further in that case except to carry out the further orders of this court, 'and from this order and the judgment entered by the District Court, pursuant to the mandate from this court, plaintiff appeals, and the defendant in error moves the dismissal of such appeal. In our judgment the motion should be sustained. It was the duty of the plaintiff to plead all of the facts which would afford him any relief in the case when it was tried the first time in the court below. This court took the record as it found it, and from the record the defendant was clearly entitled to the relief granted, and under the facts disclosed by the case made, in equity and under the authorities, no other judgment should have been rendered. The trial court, under the mandate, had no discretion in the premises, and, therefore, this appeal should be dismissed at the cost of appellant.'

The same court says (reading from paper): 'An appeal will not be entertained from a decree entered in a district court or other inferior court, in exact accordance with the mandate of this
112 court, upon a prior appeal. If such an appeal is taken, this court will examine the decree entered and if it conforms to the mandate, dismiss the appeal with costs upon application of the adverse party.'

Now I will take up the main parts of the case. Here is a California case in the 36th California Reports, page 113. It says, (reading from paper) 'The only question presented by the record therefore, is, whether the demurrer to the amended complaint was properly sustained. And looking to the amended complaint, the demurrer to which was sustained, we find nothing about a grant to General Sutter which is made the basis of the whole argument in appellant's briefs. It simply alleges that plaintiff is seized in fee, as tenant in common with said defendant, and in the possession of an undivided interest, equal to one hundred varas square, in the premises described as 'all that portion of the City and County of San Francisco bounded on the north and west by Mission Bay and Mission Creek continued westerly in a straight line to Mission Street, and on the east by Mission Bay and the Bay of San Francisco—which said interest of said plaintiff is one and one hundredth part of said premises;' that defendant has disposed of and parted with the title and possession of all the lands within said limits, except a small parcel described, bounded by lines, the first and third of which are two hundred seventy feet, the second fifty-five feet, and the fourth five hundred fifty feet long; and that defendant owns the entire interest in said last mentioned parcel, except the interest held by said plaintiff as tenant in common. Upon these allegations he asks a partition of the last named tract, and that a one
113 hundred vara lot be set off to him out of said tract. The case this presented is simply an ordinary case for partition. Defendant demurs on the ground that the facts stated do not con-

stitute a cause of action, and the further grounds that the tenancy in common shown is in a much larger tract than that which he seeks to have partitioned, and that he shown other persons to be interested as owners in a parge portion of the tract, who are necessary parties to the suit, but who are not made so, and that there is, consequently, a defect of parties. The whole argument of appellant is based upon the mistaken idea, that there is a case before the court different from that presented in the amended complaint. He seems to feel, if not concede, that if mistaken in this, he must fail, unless he is aided by the amendment made to section two hundred seventy-two of the Practice Act of 1866. We do not see how this provision can aid him. It doesn't appear to us to have any bearing whatever upon the question. If it did, it would require the whole land, and not a portion to be partitioned between plaintiff and defendant, and then the grantees of defendant would be necessary parties, because they would be directly interested in having the partition so made, if it could be done without injury to plaintiff, that the lands which should be set off to the defendant should embrace the lands held by them. They would be still deeply interested in the partition to be made between the original co-tenants and the necessity of making them parties, if any existed before the amendment would not be obviated. Besides the court, upon a full showing, is to determine the question, whether it is 'im-
114 practicable and highly inconvenient to make a complete partition in the first instance among all the parties interested, and no such question was presented for the opinion of the court, or determined.'

'The complaint shows no right to have the particular piece partitioned. Plaintiff's interest, as alleged, is in the entire tract, and not in that which remains unsold. The sale by defendant of portions of the tract could not pass his interest. He, as tenant in common, still has an undivided interest in the entire tract, and, if a partition is to be made, it must be made as to the whole. It would be necessary to consider the whole in making a partition, in order to determine the relative value of different parts. Different portions might be of greatly unequal value, and a tenant, who has an interest equal to the ratio of one hundred varas to the whole, would not be entitled to have the most valuable one hundred varas in the tract set off to him. The rights of the parties cannot be ultimately and finally determined without an examination and settlement of the rights of the parties as to the whole tract, and, to do this it would be necessary to make the grantees of the defendant parties.'

We think the grantees of defendant, upon the facts stated in the amended complaint, necessary parties, and that the rights of the parties in the entire tract should be determined. The demurrer was properly sustained.'

'The appellant, however, asks that the case be sent back, with leave to amend. But this we cannot do. The court granted
115 leave to amend, so he had the opportunity, but declined to embrace it. He chose to stake his case upon the demurrer, and final judgment was accordingly entered upon it. The appeal is

from the judgment, and we find no error to vitiate it. We hold that the court committed no error, so far as the record shows its action, and that the judgment is in all respects legal. We cannot therefore, reverse it, for we find no error to justify such action, and plaintiff cannot now amend, because there is a valid final judgment;' There is a valid final judgment in this (the case at bar) action, 'and there is nothing more to be done, without first reversing this judgment. It would be an anomaly in legal proceedings to hold the judgment in all respects correct, and then arbitrarily reverse it. But this point is settled. The party stands in a different position from that which he would occupy, in case he could appeal as he formerly could, from the order sustaining the demurrer: for, in that case, if he took his appeal in season the proceeding would be suspended at that point by the appeal, and no final judgment entered, and, upon the affirmance of the order sustaining the demurrer, there would be nothing in the way of his amending, and he could take up the proceeding at the point where he left off and proceed with his case. But now the case is ended by a final judgment already entered, in which no error has intervened whereon it can be reversed; and we are only authorized to review the action of the court below and correct its errors. Let the judgment be affirmed and the remittitur issue forthwith.'

Now if these people had stopped with the overruling of the demurrer, and stopped and said, we don't want to go any further—
116 we want to go up on the demurrer, then they could have come back and had something further to do in this court, but they go ahead and let judgment be rendered against them on three other propositions and except to that and take an appeal on that.

Now here is another California case where a demurrer was interposed to the case, which was sustained by the court. (Reading from paper). 'The plaintiffs having declined to amend his complaint, a final judgment was rendered in favor of the defendants from which the plaintiff appeals, and assigns as error the ruling of the court upon the demurrer.'

'Several grounds of demurrer were alleged in the court below, but they were all abandoned on the argument in this court, except the ground that the complaint does not state facts sufficient to constitute a cause of action.' That is one of our grounds of demurrer.

"We are asked to modify our judgment so as to grant the relator leave to amend his complaint. However, much we might be disposed to grant the petition in this respect, we are precluded from doing so by the course which counsel saw fit to pursue in the court below, and if that be found right, the only judgment which we can render is one of affirmance. The relator had leave to amend his complaint in the court below, but declined to do so—electing to stake his fortune upon the complaint as it then stood. Had he asked leave to amend, and had leave to amend been refused, there would have been action on the part of the Court which we could review. As
117 it is, there has been no action in the court below adverse to the relator's right to amend, and it follows that no action can be had upon the question in this court.'

'The application for a rehearing and for a modification of the judgment must be denied.'

Now the next case is that Eastern Cherokee case. I read that awhile ago to the court, in the beginning. Now the Supreme Court of North Carolina in the case of Bond v. Wool says: (reading from paper) 'Where the trial court, after affirmance of its judgment on appeal, enters on the docket, "judgment as per transcript filed from the Supreme Court," it is sufficient to terminate the action, though there is no written judgment signed by the judge, if any entry is necessary after such affirmance,' holding indirectly that no entry is necessary.

Now, on here in regard to the fund, and what will apply to the find will apply to the property, because the Wellsville Oil Company was made the custodian of the property until the final determination of it, and the clerk was made the custodian of the money, under the court's order. (Reading from paper) 'Jurisdiction of the court. The court in which a fund has been deposited has power to order distribution of it; and when jurisdiction is once obtained it is not lost either by the abatement of the suit, or by the dismissal of the bill. After the fund has been distributed, however, the court had no furthere jurisdiction over it in the absence of fraud. The court in which the fund is deposited has exclusive jurisdiction of
the question of the right to the moneys, and all claims against
118 the deposit must be asserted there.'

'In a proper case the court will recognize and enforce the rights of an assignee of a fund in court, or of a creditor of the person otherwise entitled to the fund, and decree distribution accordingly. One who is not entitled to participate in the distribution of the fund cannot urge objections to the right of the others to share in it.'

Now, is the Wellsville Oil Company, under this decree entitled to the distribution of any of this property to be distributed? Absolutely not. The court has held they have no interest. They allege they have a valid lease and for the purposes of the demurrer we admit it and they say their lease is based on certain things and for the purpose of the demurrer we will admit it and yet the higher court says, you have got no interest whatever, and this says, (reading from paper) 'one who is not entitled to participate in the distribution of the fund cannot urge objections to the right of the others to share in it.'

Now here is the case of Gregory v. Merchants' National Bank et al., (reading from paper) 'The money claimed in this case was deposited by the circuit court of the United States, and is held by the defendant bank subject to the withdrawal only upon an order of one of the judges of that court. It is quite clear that no proper inquiry could be made in regard to the ownership of the fund without making the judges of the court parties. But the objection to the bill lies deeper
than this. The money was paid into court under an order of
119 court, and was held by the court in custodia legis. Whether the order under which it was paid was properly or improperly made cannot be determined upon a proceeding to obtain the money

in another court. The circuit court, by virtue of the pending suit in equity, had jurisdiction of the subject-matter and of the parties'. Now, didn't this court have jurisdiction of the subject matter and of the parties in this case. (Reading further from paper) 'No other court has jurisdiction of any question pertaining to the disposition of the money which is held by that court. Claims upon the money are to be made in that court, and to be heard and determined there. This was held in Gregory v. Bank, 22 CCA 483, 76 Fed. 683, a suit brought to obtain this same money. Any other doctrine would be at variance with the right of control of its own business which inheres in every court of justice and would cause uncertainty and confusion in the determination of legal rights. It is plain that this suit cannot be maintained, because the judges of the United States Court are not parties to it, and because this court has no jurisdiction to make them parties in a case of this kind, or to adjudicate upon questions which are properly cognizable only in that court. Whether the bill is fatally'—that is about another matter. 'The decree is affirmed'.

Now (reading from paper) 'In a contest over a fund in court, the contestants need not file formal answers or exception to each other's pleadings, but may urge without pleading same all objections they may have to each other's claims, whether such objections be founded on law or on fact.

120 'Where all the facts necessary to support a plea of res adjudicata are to be found in the record, such plea may be filed in the supreme court.'

'The judgment on a rule to distribute proceeds may serve as a basis for res adjudicata, although not signed.'

Now, (reading from paper) 'where rights to a fund in the chancery court have been assigned the court has jurisdiction on the theory that a trust is involved, and where the court has the parties properly before it, it may proceed to do equity between them. But the rights of claimants cannot be determined in another suit, even after final decree, though another action has been treated as a motion in the main proceeding.'

Now have you got jurisdiction of the parties. Did you ever have? Did you ever have jurisdiction of this money and this lease? The case is finally settled and the custodian of the property and money is now subject to the orders of this court in enforcing the judgment of this court, which the Supreme Court affirmed and ordered your Honor to enforce.

By Mr. O'Meara, for plaintiff, Wellsville Oil Co.: Now may it please the court, I will not take up but very little of your Honor's time. I desire to say that I appear specially here for the Wellsville Oil Company, to suggest that so far as this motion is concerned and the matter argued here, that this court has acquired no jurisdiction of the Wellsville Oil Company for this purpose. In the first place, you- Honor rendered a judgment against us. That judgment

121 has been affirmed and the mandate has been spread upon the record. That ends this case here. Now, whatever that judgment was, can be enforced by a proper proceeding. He seems to think that it is a judgment in ejectment, giving them possession of

the land, or that it is a judgment that he is the owner of the property. There is absolutely no such thing in the judgment which your Honor rendered and therefore, there is absolutely no such thing in the judgment which the Supreme Court affirmed. Now, to get to a clear understanding of this proposition. I will call your Honor's attention to this. The Wellsville Oil Company brought a suit in equity to cancel a lease that was made to the Alpha Oil Company—it made the Alpha Oil Company a party defendant and it made Martha Miller a party defendant. Mr. Tillotson appears for Martha Miller. Nobody is appearing on this motion for the Alpha Oil Company. Now, in the first place, there is no motion before the court, because motions have to be filed in writing and there is a certain method provided for taking them up. Therefore, I called the stenographer to take this down so we would be able to tell exactly what was said and done.

Now, Your Honor didn't sustain the demurrer to our petition. What was the relief asked for in our petition? That relief was the cancellation of the lease made to the Alpha Oil Company. That was the only relief we asked.

By Mr. Tillotson—to Mr. O'Meara: Have you read your petition?

By Mr. O'Meara: Yes sir.

122 By Mr. Tillotson: All right.

By Mr. O'Meara (continuing): the cancellation of that lease and quieting title and—(interrupted by Mr. Tillotson).

By Mr. Tillotson: And in case your lease is not valid, that you be given the amount you have been out in developing this property.

By Mr. O'Meara: Well, the court simply passed on the demurrer to the petition and that is all that went to the Supreme Court. The demurrer goes to the sufficiency of the petition. Now this court held our petition was not good in equity. That is what the Supreme Court holds. It holds we do not have a right to cancel their lease in equity. It holds that we are not entitled to the particular equitable relief that we asked for.

Now the ownership of this lease has never been litigated. Our right of possession to this property, this leasehold has never been litigated. The right to the fund which has accrued from the operation of that lease has never been litigated. As to the possession of that property out there an action in ejectment would be required to dispossess us from that property because the Supreme Court of the United States has said that a court of equity cannot assume the right to pass upon the possession of real property. That is a question upon which a man is entitled to a trial before a jury and an act of congress or an act of the State Legislature cannot take

123 that right of a jury trial away from him.

Now the ownership of this fund was not litigated. Their right to this fund has never been determined. Now I would like for Mr. Tillotson to put in writing a motion in this case showing just exactly what he wants done. If he wants that money as a royalty from us, we want to know it. If he wants that money as a royalty from the Alpha Oil Company, we want to know it and we are entitled to know it. Therefore, before the court wants to assume

jurisdiction of this at all, or pass upon anything, we want in writing, as Whitcomb Riley says, on legal cap in black and white, just exactly the nature of this motion. If he is asking the royalty from us, we want to know it and if he is asking the royalty from the Alpha Oil Company, we want to know it. If our lease is not good as against him, he cannot ask us for a royalty. If the Alpha Oil Company has got a lease on his property during this time, that is the lease we tried to cancel, the lease of the Alpha Oil Company, why he has got a right to look to the Alpha Oil Company for his royalty and the Alpha Oil Company has a right to look to us for the working interest and the Alpha Oil Company is not in here asking why any such remedy as this at present. Now, any order which your Honor would make in this case, and it does not take a lawyer to see it, and I have no quarrel with all the law he read from that brief of his, but which, like the flowers that bloom in the spring, it has nothing to do with the case—if we were in here asking some affirmative relief, the court would say, you are bound by your
124 petition. The court has sustained the demurrer to the petition and the judgment of the court has been passed on by the Supreme Court and your right to affirmative relief is ended. They never asked for any affirmative relief. Your Honor never passed on their right to affirmative relief and the Supreme Court of the state has never passed on their right to affirmative relief.

If they want affirmative relief, if they are entitled to it, there is a legal way to get it. If they want to get us out of possession of this property, let them bring an action in ejectment to get us out of possession. If they want to acquire this money, the ownership of which has never been adjudicated, let them file an appropriate action for that purpose or an appropriate supplementary pleading in this case, although I doubt if they could do it, but there is nothing before the court—that is no paper filed here. Now what will the court say? Give his own construction to this journal entry? That demurrer—what did that determine? That we were not entitled to any affirmative relief? It left us where it found us.

What do they do in reference to this stipulation. We could have appealed under the Oklahoma practice from this demurrer and they could have gone ahead and tried their case, pending the appeal on this demurrer, if they had asked for affirmative relief, but they didn't in the lower court ask for affirmative relief. Then, instead of having a receiver appointed, the court said, and the parties agreed the property should remain in our possession until the ownership of that property had been determined. What did the court
125 mean? Until the ownership of that property had been determined.

The find arising from the operation of this lease was put into the hands of the clerk of this court, until what? Until it should be finally decided to whom it belonged. So far as this court knows, and so far as this record speaks, and we speak only from the record, these people are not asserting any right to this land and not asserting any right to this leasehold, and they are not asserting any rights to the proceeds derived from the operation of that lease

because they have not filed in this court a single plea. Now what is your Honor asked to do? Render a judgment in favor of Martha Miller for money when there is no pleading setting up her claim to it, when her right to it has not only not been litigated, but has not been asserted in any court of justice. Your Honor's judgment would be as void as if it was written by the Grandike Coons of Swat, because your Honor can only render a judgment on an issue that is before it and no issue as to the ownership of this property has ever been made in this court and no issue is made now. They jockeyed. did some jockeying as they went along. Instead of pleading their title and having their title determined, they elected to stand upon the weakness of our title as we plead it and the court has said, the Supreme Court has said, not that we have no legal rights, but we have no right to the relief we demanded and the right to this property has not been passed upon and cannot be passed upon now by your Honor, unless some issue raised by proper pleadings and then

126 when your Honor passes on that, that becomes a separate judgment from which we have the privilege of appealing, because their ownership of this property was not at issue in the case that went to the Supreme Court of the State of Oklahoma.

Aside from that, your Honor, this case, while it would not make any difference with you, perhaps, until it came before you proper, this case is being appealed as quick as the record can be made out, to the Supreme Court of the United States from the Supreme Court of Oklahoma, but aside from that, there is no issue here. These people have not asserted any claim to any property. Their right to this property has not been litigated. A court of equity could not divest me of the title to personal property in a possessory action. A court of equity could not divest me of the possession of real property.

Now what did we consent to this *this* case. This stipulation says, that in lieu of giving a supersedeas bond, the money was to be paid into this court. Now what is that? That is just in lieu of a supersedeas bond, and also, as was suggested by Mr. Noble, instead of having a receiver appointed and receiver's fees eating the property up—they just let the money be paid in court and deposited in some bank.

I don't want to take up your Honor's time but if your Honor should take a notien to assume jurisdiction, because you have none, we would expect to hold the clerk on his official bond and if we can find our from him the bank in which this money is deposited, we will expect to hold them, until it can be ascertained in a legally constituted tribunal to whom this property belongs.

127 Now I don't know what the attitude of the Alpha Oil Company is. Their attorneys are not here. I don't know further that they are entitled to this property now or not and anyhow, in this kind of proceeding, which cannot be at all, unless it is a voluntary jurisdiction, the Alpha Oil Company is not in court in this proceeding and if we have any interest in this fund or money, certainly your Honor could not take it away from us and give it to Mr. Tillotson's client and they it might turn our that Mr. Tillotson's client was not entitled to it and we have to litigate the same question

with the Alpha Oil Company again. Now we are willing to pay the penalty once—that is all.

By Mr. Tillotson:

If the court please, I am, in my own estimation at least, somewhat of a bluffer, myself, but I never tried to carry it so far as my friend Mr. O'Meara has tried to carry it—(interrupted by Mr. O'Meara).

By Mr. O'Meara:

You will find out if we are bluffing.

By Mr. Tillotson—(continuing:)

and I never expect to. We just simply want the law, and the fact that this court has no jurisdiction, is one of the most absurd propositions that I have ever heard put to a court. It may not be absurd to anybody else, but it is certainly absurd to me. Now then, let's turn to the petition. I will venture the assertion that if counsel, for he so stated, has read the petition, that he has forgotten what was in it, if he ever read it. Here is the amended petition. (Reading from amended petition).

128 'That the defendant Martha Miller, née Everett, was at all times mentioned in this petition the allottee and the owner in fee simple of the following described land situate in Rogers County, Oklahoma, to wit' and then describes the land. (Continuing reading) That the plaintiff was the owner of an oil and gas mining lease covering the above described land executed by Calvin Everett, guardian of said Martha Miller, née Everett, which said lease was to expire on the 16th day of March, 1908.'

'That notwithstanding the short duration and term of said lease, and relying upon the promises, agreements and assurance of Calvin Everett, guardian of said Martha Miller, née Everett, and said Martha Miller, née Everett, herself, plaintiff proceeded to develop and mine the above described land for oil and gas under the terms of said lease.' Now then, they go ahead. 'That upon the filing of the petition in equity the United States Court for the Northern District of the Indian Territory' did certain things. 'That a bonus of sixteen hundred dollars' was deposited in the Union Bank and Trust Company at Chelsea, Indian Territory. 'That on the 24th day of July, 1907, Calvin Everett, guardian and next friend of Martha Everett, now Miller, filed his report in said United States Court for the Northern Judicial District of the Indian Territory, sitting in Chancery, disclosing the execution of the above described oil and gas mining lease.' 'That under and by virtue of the lease hereinbefore set out and marked "Exhibit C", the plaintiff on the 16th day of March, 1908, entered into the possession of the above described land and continued the operation thereof.' 'That said contract of lease was duly and legally entered into between this plaintiff and the
129 defendant Martha Miller, née Everett, and is a valid, existing and binding contract upon the parties thereto, and that this plaintiff is entitled under said lease to the possession and control of the lands described in said lease for the purpose of conducting

thereon oil and gas mining operations.' And in that demurrer it admitted that and yet the Supreme Court says, that is not true—you are not entitled to possession.

By Mr. O'Meara—to Mr. Tillotson: Will you please point out where it says we are not entitled to possession.

By Mr. Tillotson: Yes. It tells you that you didn't come into court with clean hands and you have got no rights whatever.

By Mr. O'Meara: Well, read it.

By Mr. Tillotson—(continuing): And that you have not performed your condition precedent and therefore you acquired no legal rights.

By Mr. O'Meara—to Mr. Tillotson: Well, read it.

By Mr. Tillotson: I will show you it says it, and if it don't, I will let you have judgment.

By Mr. O'Meara—to Mr. Tillotson: Read that part.

By Mr. Tillotson—continuing: In the year 1907, upon the petition of the guardian of a minor, full blood, allottee, the United States Court for the Northern District of the Indian Territory, sitting in equity made an order directing the minor to join in executing an oil and gas mining lease upon the ward's allotment upon condition that the lease should be approved by the Secretary of the Interior. Held, that this condition requiring the approval of the Secretary of the Interior was a condition precedent in the lease contract, and no estate vested thereunder until this condition was performed, although the condition may have been void. (Interrupted by Mr. O'Meara.)

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By Mr. O'Meara: Read that part about possession.

By Mr. Tillotson: I will.

No estate vested thereunder until this condition was performed, although the condition may have been void, and you admit in your own petition that you never did perform that condition.

By Mr. O'Meara—to Mr. Tillotson: Well, read it.

By Mr. Tillotson: Just hold your horses—I will read it.

A condition subsequent operates upon estates already created and vested and render- them liable to be defeated, while a condition precedent is one that must be performed before any estate can vest, or be enlarged. (To Mr. O'Mara:) Do you catch it. A void condition subsequent in a lease contract cannot operate to defeat an estate already vested thereunder, but a void condition precedent prevents any estate from vesting and renders the lease void, unless the condition is performed.

Now, how did the Supreme Court know the condition was not performed? Because the petition so states. (Reading from paper:) "Where the alleged cause of action set out in a petition in a suit in equity shows that the right or claim relied upon for relief is based upon a breach of a contractual obligation, existing between the parties thereto," and they had a lease contract and *was* in possession, and this very syllabus absolutely covers that proposition, and I will show you, (continuing reading) "a breach of a contractual obligation, existing between the parties thereto, such plaintiff does not come into court with clean hands, and a general demurrer

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to the petition for want of equity is well taken and should be sustained."

By Mr. O'Meara—to Mr. Tillotson: You have not read the word "possession" out of there?

By Mr. Tillotson: Do you suppose the Supreme Court didn't have any sense when they saw it in your petition and they decided that on it? Why it is ridiculous. Now let's go ahead and see. Now they have alleged they were in possession of this land and they have asked a restraining order against us and the Supreme Court, notwithstanding the fact you were in possession,—notwithstanding the fact you asked for a restraining order say, we are not going to give you the relief because you are not entitled to it. (Reading from amended petition:) "That said contract of lease was duly and legally entered into between this plaintiff and the defendant Martha Miller;" "That this plaintiff is informed and believes and so
132 believing alleges that the defendant, the Alpha Oil Company claims to have some right or interest in or to the leased premises described in this petition."

"Plaintiff further avers and alleges that the pretended claim or right of the said Alpha Oil Company has no foundation in fact or in law" and we admit all that by our demurrer—"and is based upon an alleged lease from Martha Miller, née Everett, to the said Alpha Oil Company, executed long subsequent to the lease to the plaintiff herein and after the time when the said Martha Miller, née Everett, had executed a valid legal and binding lease to the plaintiff herein and at a time when the said Martha Miller had no legal right or authority to make a binding lease upon said premises to any other party; and at a time when this plaintiff was in rightful possession, of said land, in pursuance of said lease." The lease is the contract, and the Supreme Court says a 'violation of these contractual obligations, don't it?' (Continuing reading from amended petition:) "in pursuance of said lease made and executed under the proceedings hereinbefore set out, and that said lease had been regularly and properly ratified and confirmed and approved by the United States Court for the Northern District of the Indian Territory." That at the time said lease herein set out was made and entered into the Secretary of the Interior was—"—Now they go ahead in that paragraph and admit the Secretary of the Interior didn't approve that lease, and the allegation was that it was unnecessary. Now, lets go further and see about this money. Now here comes in a second cause of action, but before that—(turning through papers)
133 is one paragraph—I guess maybe it is in this one—Now here is their second cause of action. "Plaintiff hereby adopts and makes a part of this second cause of action, all of the allegations contained in the first cause of action alleged herein. That for many months after the 18th day of March, 1908, plaintiff continued in possession of said land and continued at its own expense to operate and pump the oil wells thereon, running all of the oil produced into the pipe line of the Prairie Oil & Gas Company; that on or about the blank day of blank, the defendant Alpha Oil Company fraudulently hired the pumper whom this plaintiff had placed in charge

of said lease, to become the agent and representative of the defendant Alpha Oil Company, and to hold, or pretend to hold, possession of said lease and to operate the same for the Alpha Oil Company instead of for this plaintiff. That for some months thereafter, and over the protest of this plaintiff, the defendant Alpha Oil Company continued to assert possession of said lease through said agent and employee; that on or about the month of July or August, 1910, the Alpha Oil Company abandoned possession of said land and the oil wells thereon and refused to incur any further expense in connection with the production of oil from said land; that to preserve the value of the oil wells on said land and to preserve the value of the land itself as an oil producing property, and to preserve the rights of this plaintiff under its lease covering said land, plaintiff immediately placed in charge of said lease a competent pumper and at all times since said month of July or August, 1910, has continued to keep said pumper in possession of said land and said oil wells and
134 has continued to produce oil from said land, all at its own cost and expense; that at no time during the two intervals that this plaintiff has produced oil from said land, has this plaintiff received payment for any oil produced by its efforts and at its expense as aforesaid, but that, on the contrary, the proceeds of all oil belonging to the working interest under said lease were held by the Prairie Oil & Gas Company, the pipe line company purchasing said oil, which fund finally reached the sum of twelve or thirteen thousand dollars, and which said fund has recently been paid to the Clerk of this Court by the Prairie Oil & Gas Company under order of this court; that during all of said time since said 18th day of March, 1908, the said Martha Miller has received payment for the royalty portion of said oil so produced by the efforts and at the expense of this plaintiff; that the expenses thus incurred by this plaintiff were in all respects necessary to properly produce oil from said land and to keep the oil wells thereon and the equipment thereof in proper condition as an oil producing property, and that said expenditures up to the time of the filing of this petition amount to $2,500.00; that during the p-riod of said expenditures this plaintiff relied upon its title to said lease for oil and gas mining purposes covering said land, and that said expenditures were made in pursuance thereof, and that this plaintiff is entitled to reimbursement for said expenditures out of said fund now in the custody of this court." Now, then, they have interlined here—it is a litle hard to read but it covers the proposition that they expended eight thousand dollars in developing the property.

135 Then they go on and say (reading from amended petition) "Wherefore, plaintiff prays that the lease set out in Exhibit C attached hereto be declared a valid, legal, binding and subsisting agreement between the parties thereto; and that the defendant Martha Miller, née Everett, and the defendant the Alpha Oil Company be enjoined and restrained from in any manner interfering with the plaintiff in the possession, use, occupancy, development or operation of the land described in said lease for oil and gas mining purposes. That the pretended lease executed by Martha Miller, née

Everett, to the Alpha Oil Company be declared to be invalid and void and that the same be canceled of record and that upon final hearing a permanent injunction issue herein restraining and enjoining the defendants and each of them permanently from interfering with this plaintiff in the operation of this lease for oil and gas purposes and the production of oil and gas therefrom; that if the court decree that this plaintiff has no valid and subsisting lease covering said land, that it further decree that this plaintiff have reimbursement for all necessary and proper expenses incurred by it in the production of oil from said land to the date of such decree, and that said reimbursement be made out of the fund now in the custody of this court, and that the plaintiff have such other and further equitable relief as shall be just.

By the Court: Gentlemen, my mind is very clear on this, but I want to read over the papers and I will give you a decision Monday morning.

136 By Mr. O'Meara: Before any journal entry, I would like for your Honor to require, before you decide the matter, that Mr. Tillottson make his motion in writing so we can see just exactly what it is.

By Mr. Tillotson: I don't have to do that. You want me to delay the matter another three years. All we ask the court to do is to carry out the mandate as shown here and we do not propose to file anything.

By the Court: Whatever the decision of the Supreme Court is will be this court's decision.

By Mr. O'Meara: Let's see the record.

By Mr. Tillotson: We are not going to be caught in any trap.

By Mr. O'Meara: Well, we like to have things in the record. (At this point Mr. O'Meara dictates to the reporter as follows:)

The Wellsville Oil Company moves the court to require Martha Miller to make his motion in writing and file the same in court in order that proper exceptions and objections either may be taken and because such practice is required by the civil code of procedure. Now what does your Honor hold?

By the Court: That it is not necessary.

137 By Mr. O'Meara (continuing): And the court holds that it is not necessary that the motion be made in writing, to which exception is taken by the Wellsville Oil Company.

By the Court: I will state that this court will render the exact opinion as sent back by the Supreme Court in so far as it is within my power to do so and before handing down an opinion in this I will ask to read the pleadings to see just what was before the Supreme Court and review what was before this court at the time of the trial in order that I may get this matter settled in accordance with the mandate of the Supreme Court. This court cannot enlarge upon or diminish from that and judgment, if handed down, will be in accordance with that of the Supreme Court.

By Mr. O'Meara: I will not be here Your Honor, because I have to be in Bartlesville and before any journal entry is signed, we will have an opportunity to see it I suppose.

By Mr. Tillotson: Oh yes.

By the Court (continuing): Now I am very clear on what the court should do at this time, but I want to refresh my memory on that.

By Mr. Tillotson: The court desire to have this brief left?

By the Court: I don't know that it will be necessary, but
138 I want the files.

And be it remembered, that at this time, further argument in this case is concluded.

And be it remembered, that upon the minutes of the Clerk there appears the following entry, in this cause.

Jan. 2, 1915.—Argument of counsel heard by court on motion of Martha Miller for final order. Court adjourned until Monday morning at 9 o'clock.

139 And be it remembered that upon the minutes of the court clerk within and for the County of Rogers and State of Oklahoma there appears for the District Court in and for said County and State the following entry:

January 8, 1915.

Court met pursuant to adjournment at 9 o'clock A. M. Jan. 8, 1915.

Present and presiding: The Honorable T. L. Brown, Judge; C. T. McClellan, Clerk; John W. Leach, Sheriff, and W. M. Hall, County Attorney.

Court having been opened in due form of law the following proceedings were had, to wit:

140 In the District Court within and for the County of Rogers and State of Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, Plaintiff,
vs.
ALPHA OIL CO. et al., Defendants.

And be it remembered that on this day, to wit the 8th day of January, A. D. 1915, court having convened pursuant to adjournment heretofore taken, same being one of the regular judicial days of the December 1914 term of said court, there appeared in open court J. A. Tillotson, representing the defendant, Martha Miller; W. J. Gregg appearing in place of and in the stead of J. P. Hurley, representing The Alpha Oil Company and Martha Miller; and Messrs. Veasey and O'Meara representing the plaintiff, Wellsville Oil Company, whereupon, the following proceedings were had.

By Mr. Tillotson: If the court please, I argued this case last Saturday and it was postponed until Monday at 9 o'clock for decision and we met here Monday and agreed to continue it until 9 o'clock this morning, and it is up now to the court to carry out the mandate of the Appellate Court and we are going to ask now that that be done and would like the decision of the court.

By the Court: Have you gotten hold of a copy of the decision?

141 By Mr. O'Meara: I have a copy of it here Your Honor and the part I care to call your Honor's attention to is this. My argument before was that the Supreme Court had not passed on the right of possession—had not passed upon the right of the parties to this money and that the decision of the Supreme Court simply affirmed the decision of the lower court in sustaining the demurrer to the petition. That so far as this record was concerned, there was no litigation in reference to the possession and no litigation in reference to this money and no judgment of the court below in reference to the money or in reference to the possession of the property and therefore, the decision of the Supreme Court affirming the decision of the court below could not have passed upon the right of possession or the right to the money.

Now in the last paragraph of this opinion, it says: Plaintiff is in possession. It invokes the jurisdiction and equity to have the lease under which it is claiming declared valid and the lease of the Alpha Oil Company declared invalid. It may be that the plaintiff in error could not be dispossessed without being compensated in the manner in which it should be, but that can not be done in this suit, and it leaves that question open.

By Mr. Gregg: Is that the first opinion or the second opinion.

By Mr. O'Meara: It is the second.

142 By the Court: Are there two?

By Mr. O'Meara: They modified the first opinion. They didn't change the result of the decision.

(At this point the opinion is handed to the court for perusal and the court looks over same.)

By the Court: Anything further in this case gentlemen?

By Mr. O'Meara: I have nothing to say.

By Mr. Gregg: I was not here the other day, Your Honor. I didn't hear the decision, but from what I did hear I had gotten the impression that your Honor felt that this money, having accumulated practically in the hands of the court, ought to be distributed. Now I was at one time in this case as one of the attorneys for Martha Miller and the Alpha Oil Company and withdrew at the time this suit was filed, that is, I never was in this suit, but the one pending in Nowata County, before it was finally dismissed and this suit was filed and practically continued the same controversy, except that since the matter was assigned for argument in the Supreme Court, I went, at the request of Mr. Hurley, and he is the attorney of record for Martha Miller and I am appearing here again today to represent Mr. Hurley's interest in the matter, and for that reason I feel

a little bit timid about taking much action in the matter. I do not want to do anything that would involve the rights of Martha Miller in this matter. There has been no conflict between Martha
143 Miller and the Alpha Oil Company up until the present time. If there is any now and if there is to be any, I want to represent the Alpha Oil Company, if there is to be any room for any controversy, but I — not think there is any room for any controversy now. Mr. Hurley has always told me that there was an agreement to pay him a contingent fee of two thousand dollars, fifteen hundred of which Martha Miller was to pay, because of the fact that under her contract with the Alpha Oil Company she was to place them in possession. There was some dispute as to whether she ever done that or not. Now if the court is going to make a distribution of the funds in your hands, because you are going off the bench, you are going to make an order about that—I tried to get a settlement and it was at my request this matter was passed over—we thought we could get an agreement out of all the parties. I understand the other gentlemen are contending they are in possession and that they are entitled to compensation for certain improvements on the property and for certain work done in the production of the oil. I tried to adjust that difference with them and felt, when I asked your Honor to continue it that we would reach an adjustment of that, but we have not been able to do so, so if your Honor is going to make a distribution of the funds this morning, I am inclined to believe that since all this money was paid into court here as a result of your Honor's order in this particular case and it is in custody of the court, it is here the same as if it was in your Honor's pocket, so far as that is concerned, I am inclined your Honor has a right, if he
144 wants to, to make an order distributing this money, but I would like then to go a little further—I would like first for an order in this case—a judgment in this case. Under the stipulation that is, I would want the first judgment under which the appeal was taken simply dismissed in the case, but if you distribute the money, I would like the additional order that a writ of assistance issue putting Martha Miller in possession of the property, subject to the lease between herself and the Alpha Oil Company, so far as Martha Miller is concerned and this order is concerned, because none of it would go to the plaintiff. Your Honor held on the demurrer that the plaintiff didn't state a cause of action and they had no right to the property. This money has accumulated while this litigation has been pending in the last six or seven years, or whatever time the suit has been pending and of course, this money having accumulated from the production of oil, if the plaintiff was not entitled to any relief in the first place, they would not be entitled to any proportion of the money, so they would get none of it if you distribute it.

As between Martha Miller and the Alpha Oil Company, they have agreed about the attorney fees and there has been certain things (payments) made to Martha Miller by the Alpha Oil Company and of course the plaintiff is not in any wise concerned in this bonus money and it has been figured out there is twelve thousand dollars

yet due Martha Miller from the Alpha Oil Company, out of which she is to pay her attorney's fees, but we have agreed that the order as between Martha Miller and the Alpha Oil Company shall be made this morning, if your Honor distributes it, ten thousand dol-
145 lars to—(interrupted by the court).

By the Court: If the court decides to distribute the money, that is a question for you folks.

By Mr. Gregg: If the court decides to make the order, we would like so far as the Alpha Oil Company and Martha Miller is concerned, that the division of the money should be made as follows: The court pay to Martha Miller ten thousand four hundred and fifty-six dollars of the fund in your hands arising from the sale of oil since this demurrer was sustained—the balance, two thousand four hundred and twenty-four dollars and forty-four cents, together with the fund in the hands of the Prairie Oil and Gas Company, amounting to eight thousand and some dollars should be ordered paid over to the Alpha Oil Company; that as between them and Martha Miller and in addition to that, we would like for you to make an order awarding the possession of the premises as against the plaintiff in this case to Martha Miller, subject to the right of the Alpha Oil Company, under its lease and that a writ of assistance be issued to carry it out (Interrupted by Mr. O'Meara).

By Mr. O'Meara: The one other place we are told they divided his ring and cast lots for his clothes. (Laughter.)

By Mr. Gregg, continuing: I assume that this is correct. I may be wrong about it, but all this money is a result of the sale of
146 oil from the premises. Plaintiff claims they should have the premises and the Alpha Oil Company and Martha Miller should be enjoined. Now they have nothing to say about the distribution of this money, unless they are entitled to all of it.

By the Court: I think you will have to cast lots for that division. The tail goes with the hide to my mind.

By Mr. Tillotson: I represent Martha Miller alone—I mean I do not represent the Alpha Oil Company in this case—just Martha Miller. Our Supreme Court has held that the lease given by my client is not good and that they are not entitled to anything as against my client under that lease. Now that is what they have held. Now then, we want our money and when we get that, it is a question with the other people then as to some other matters.

By Mr. O'Meara: But we want to shorten this matter. We are going to appeal this main case to the Supreme Court of the United States and all we want in this case, if your Honor is going to decide, without any pleading, and without any trial as to this question, that this money is to be distributed, all we want is three days' time within which to execute a supersedeas bond.

By Mr. Gregg: The point is this. You have to do something with this money—go on and keep it or distribute it.

By the Court: If it is just the same, I will keep it.

147 By Mr. Gregg: I occupy a peculiar position, but I don't want to do anything that will prejudice Martha Miller's rights. We have come into court, at least Martha Miller has, along

with the Alpha Oil Company and litigated her right to the premises and the production of oil from it all through the state courts, and it is the duty of your Honor to carry out the mandate of the State Supreme Court. They have two years to appeal to the State Supremem Court if there is a federal question. I don't want to be put in the attitide of representing Mr. Hurley, who has been all the time in this case, representing Martha Miller and the Alpha Oil Company, because there has been no conflict of the interest, and I do not want to be put in the attitude of keeping her out of her money a day. The only thing I wanted to say is we had agreed on how it should be divided. These other gentlemen can not be interested at -ll, whether the court pays it all to Martha Miller and the Alpha Oil Company.

By Mr. O'Meara: There is some difference. If it is going to be paid out at all, without a trial, we would rather have it paid to somebody who is solvent, because if we reverse this judgment, we would like to have some show. So far as the Prairie Oil and Gas Company is concerned, they are not before the court in any way.

By Mr. Gregg: That fund is by virtue of the stipulation made a part of this other and I take it it is the same as if produced since.

148 By Mr. O'Meara: I just want to get the record straight on it. The other day when this matter was taken up, I told your Honor we appeared here specially for the purpose of questioning the jurisdiction of the court over these parties after the mandate of the Supreme Court had been spread upon the record and the case was over, so far as this court was concerned, except that the court had a right to make orders I expect, carrying into effect the judgment. The only judgment your Honor can render against us in this case is the judgment against us for costs in sustaining the demurrer to the petition. Your decision has been affirmed and of course the costs should go against us. That is all that your Honor could do in reference to us in this case. These people, in the litigation which was had here, set up no claim to this property,—neither Martha Miller or the Alpha Oil Company asserted any claim upon which the court could pass. The Supreme Court has simply decided that our petition didn't state a cause of action. The Supreme Court has simply decided that although Martha Miller's guardian obtained a judgment in the Chancery Court of Indian Territory, and although all we were seeking was to enforce a chancery judgment which she had obtained that we did not come into court with clean hands. That is all they decided. It is a novel proposition and interesting solely because it is novel. If you are going to hold this money shall pass from our hands, without any trial and without any process of law. why all we want is that the record shall show that and that we shall have three days in which to make a supersedeas bond.

149 By Mr. Gregg: Now Mr. O'Meara's statement is partially correct and partially not correct, because while it is true there was no answer filed here, both Martha Miller and the Alpha Oil Company came in and filed a demurrer to the petition filed by the plaintiff in this case, upon the argument, to which your Honor sus-

tained *and* demurrer, entered judgment here and dismissed the cause. I will read. (Reading from journal entry:) 'And all parties announcing ready for the consideration of said demurrer, the court considers the same after argument and finds that said demurrer should be sustained. To which ruling of the court the plaintiff then and there excepted. Whereupon the plaintiff elected to stand upon its amended petition, and on motion of defendants the court renders judgment in favor of the defendants and said cause is dismissed and the temporary injunction issued herein is dissolved.' Now then they pray for time to appeal and they were given it. Now comes this. (Reading from journal entry:) 'Thereupon counsel in open court stipulated that the custody of the leasehold involved in this suit should remain in the plaintiff until the final adjudication hereof, and that the moneys derived from the property should be paid by the purchasing pipe-line into the custody of the Clerk of the District Court, Rogers County, Oklahoma, to be by him deposited in some State Bank within the State of Oklahoma, and the filing of a supersedeas bond herein is waived. It was further stipulated that the status of the property and of the parties shall remain the same until the final adjudication hereof. The foregoing stipula-
150 tion is approved by the court and made a part of the final judgment herein.'

Now, Mr. O'Meara says there is no issue—that neither the Alpha Oil Company or that Martha Miller are claiming this property in this case. The petition in this case alleges that the real estate belongs to Martha Miller. The petition in this case alleges that the plaintiffs have a right to possession by virtue of a certain oil and gas lease executed on this property by Martha Miller and her guardian jointly. They also allege there is a lease existing between Martha Miller and the Alpha Oil Company and they further allege that the Alpha Oil Company and Martha Miller have entered into a conspiracy against them to defeat them out of the proceeds of the oil contained on this land and as a part of this conspiracy have executed this subsequent lease. Now, I don't think it is necessary for your Honor to render any further judgment in this case and I am not asking for any so far as I am concerned, than your Honor has already rendered in this case, except the matter of possession, and if this stipulation means anything at all, "the final adjudication hereof" it means just that, and it means the final adjudication in the state courts—it could not mean anything else. This court is absolutely bound to respect the decision of the Supreme Court of the state. Now so far as this court is concerned, this litigation is ended and of course, if there is a federal question that of course is a matter that they have to present to the Supreme Court and the Supreme Court will have to pass upon that. They can present that and get the writ or order, or they can go to the Supreme Court of the United States and get it
151 ordered or they can present it to the Supreme Court of the State and if they determine there is a Federal question, they can get a writ of error.

Now I do not ask your Honor to make any additional judgment in the case. I simply say, by making a distribution of the money,

we have agreed upon the way it should be divided so far as we are concerned and the proceeds of the sale of oil from this property, they pleading affirmatively it is Martha Miller's and the court having decided all questions against them, they cannot complain, that your Honor is making distribution of money as between Martha Miller and the Alpha Oil Company, and of course the pipeline money is just as much as part of this as any other money.

By Mr. Tillotson: There is just one further thing I desire to call your Honor's attention to and I would like for your Honor to try and think why Mr. O'Meara is justified in stating that nothing but the demurrer was passed on by the Supreme Court. I just want to read two paragraphs here and then I am through. (Reading from journal entry:) 'Whereupon the plaintiff elected to stand upon its amended petition, and on motion of defendants the court renders judgment in favor of the defendants and said cause is dismissed and the temporary injunction issued herein is dissolved.' Now they appealed from all that and here is what the Supreme Court said: The trial court was right in sustaining the demurrer. Now in a different paragraph, following this, we have this language of the Supreme Court.—We recommend that the exceptions be overruled—
152 that is the exception to the demurrer and the judgment, and that the judgment appealed from be affirmed. Now, what did they appeal from?

By Mr. O'Meara: Well, your Honor, we are not asking much. All we want is an exception and three days in which to execute a supersedeas bond. That is usual and customary in courts of justice every place I think.

By Mr. Gregg: Mr. O'Meara, do you think you have a right to supersede the matter of the distribution of the funds in the hands of the court, or supersede the court's entering the judgment of the Supreme Court?

By Mr. O'Meara: No, no, the judgment of the Supreme Court has already been entered. All we want, if your Honor makes an order in reference to the possession of this property or in reference to this fund is that we be given three days' time within which to file a supersedeas bond.

By Mr. Gregg: If your Honor makes a distribution of this money, I would like to have included in the order an order of possession, subject to the rights of the Alpha Oil Company under the lease which is not disputed by Martha Miller, except that they charge there is a conspiracy and the court finds that is not true and I think there should be a writ of assistance to place her, or Martha Miller and the Alpha Oil Company both, to place them in possession of this
153 property. Then, if we can not enforce it, they can come in and enjoin us when we undertake to oust them.

By Mr. Tillotson: They are back in this court right now. That mandate brings it back. The Supreme Court has no more jurisdiction in this case than I have and they have so held after it gets back. This case has been finally settled and it is up to your Honor to make a distribution of the property under your judgment that they appealed from in September, 1911.

By the Court: Gentlemen, I have enjoyed your argument very much, but there is nothing plainer to my mind than what the duty of the court is. The duty of the court is to render judgment in accordance with the mandate of the Supreme Court and the mandate of the Supreme Court is the sustaining of the original judgment of this court and of course the court is going to do that. Now there may be some quibble as to what the judgment means, but to my mind there is not any doubt about it. You men for the plaintiff come into this court and ask for equitable relief; they ask for an injunction—they ask that an injunction be granted against the Alpha Oil Company and Martha Miller; they also ask that their lease which they had be declared a valid one, alleging that they were in possession *that* that they were the rightful owners of that lease. Now this court, when it came upon demurrer—true, there was no answer, but the plaintiff set up all of its cause of action. Everything that was before the court was before the court in plaintiff's petition and the court said, the demurrer is sustained because of the fact
154 that the relief you ask for is not equitable and you have no equitable relief coming to you and the demurrer was sustained.

At that particular time there was certain funds paid into the treasury of the court and it has the same effect as if laying upon this table and the only judgment this court could make at that time would have been a dismissal of your cause of action and if there had been no appeal and everybody gone away and left the thing as it was, it would have left the court to have distributed that money—his it was and his judgment was dismissal—that you were wrongfully on there and the court will have to distribute the money. Now you went to the Supreme Court and they said this court was exactly correct and on 11 and 12, it undertakes to give a reason for the first cause of action and for the second cause of action and on the last page, just before the paragraph which you read, it undertook to decide every possible phase in this case, save and except the rights that you had there by reason of your machinery.

This court is a court of equity and not a court that can dispossess that man, because that is a legal proceeding, but the court can find and should find and did find, as I view it, that the defendant Martha Miller is the rightful owner of that property and that she had made a lease.

Now the Alpha Oil Company is only in here as party defendant and the court only takes knowledge of them by reason of the fact that you have asked relief against the Alpha Oil Company and the court said you should not have that. The court has no knowledge of them except they have been brought in the suit—the suit is by the Wellsville Oil Company on one side and Martha Miller
155 on the other, but the court now takes knowledge that Martha Miller has entered into a lease with the Alpha Oil Company, whereby she was to perform certain things and do certain things and they were to have possession of that property.

Now on that question, *U* just as well add, so far as the attorney fees spoken of by Judge Gregg, the court has no power whatever to regulate attorneys' fees. The statute provides how a person can se-

cure their fee if they perform their part of their duty—then in that event they would be safe.

Now this case comes back for entering final judgment. There is no case pending now in the Supreme Court of the United States and giving my idea about it I will say the opinion of the court is, there is no federal question, but that is not to be determined by this court, but by the proper tribunal and this court can only do one thing and that is to enter judgment in accordance with the mandate of the Supreme Court and in my opinion that is that Martha Miller is entitled to the possession of that property and the fund arising from that belongs to Martha Miller when she has complied with her lease to the Alpha Oil Company and let it be so ordered and if a supersedeas bond is asked, let it be denied.

By Mr. O'Meara: Will you then suspend judgment of this court for three days until I can apply to the Supreme Court for supersedeas, if you will not give us a supersedeas.

By the Court: I don't think I can.

156 By Mr. O'Meara: You are asking an order disposing of property. Now give us time to tender a supersedeas, because we can not unless your Honor does that. Court be in session Monday?

By the Court: No.

By Mr. O'Meara: Tomorrow?

By the Court: No.

By Mr. O'Meara: Well, give us until tomorrow to file a supersedeas, fix the amount to cover everything and give us until ten o'clock.

By the Court: If you had one right here I don't think I would approve it because I don't think I could do it.

By Mr. O'Meara: Suspend the judgment for three days until we can apply to the Supreme Court. Suspend it for three days. All we want is a chance to test it.

By Mr. Tillotson: If the court please, they have had, with the exception of four days, since the 24th of December in which to apply to the Supreme Court of this state, or the United States, or take any action they desired to tie this matter up. The four days I speak of was our agreement last Monday that nothing was to be done between Monday and today and they kept that agreement. Outside of those four days, they have had since the 24th of December.

157 They have had since the 22nd day of December if you please. Now, I say that any bond that they would present to your Honor would be absolutely void and we could not collect a penny on it.

By the Court: I don't think they could give a bond at all, but the only question I figure on at all is whether or not to suspend judgment.

By Mr. O'Meara: All I want is to suspend the judgment until we can make an application to the Supreme Court. Now we have kept the agreement we made here the other day and but for that we would have applied to the Supreme Court for a writ of prohibition, but we made an agreement with Mr. Tillotson that nothing

should be done until 9 o'clock this morning. Now we have kept that agreement. Now, if you refuse to let us supersede the judgment—(interrupted by the court)

By the Court: I don't think I can—I want to do what is right.

By Mr. O'Meara: In the event the bond is tendered, how much bond do you gentlemen think should be required.

By Mr. Tillotson: We claim your Honor the bond would be void and this court would not have any right to approve such a bond for a million dollars and tie this matter up.

158 By the Court: I think it is a question this court would not have any jurisdiction. You raise a question I have not thought of. I think I will (interrupted by Mr. Gregg)——

By Mr. Gregg: Your Honor, I just want to have one word. I think you could make your order—(interrupted by the court)

By the Court: I expect to make this payment order.

By Mr. Gregg: We agree how it should be paid. Out of the funds in your hands, ten thousand, four hundred fifty six dollars can be paid absolutely to Martha Miller—the balance to the Alpha Oil Company and we agree—(interrupted by Mr. Tillotson)

By Mr. Tillotson: That can be settled in the journal entry.

By the Court: Whatever you agree on is all right.

By Mr. O'Meara: If you will not permit us to supersede, all we want is this judgment, which your Honor is about to render, shall be suspended for three days, or say until Tuesday.

By the Court: There will be no Judge here. I go out Monday morning. If I was going to be on the bench I would not care about that. I don't know when Judge Campbell will be here.

By Mr. O'Meara: Just enter your judgment and suspend it for so many days?

159 By the Court: I am not in full accord with the suspension of a judgment. I see no reason why two people should get into a law suit and one win the law suit and after he gets it won, tie his hands so he cannot carry it into execution.

By Mr. O'Meara: There is a good many things we understand, but they are perhaps not matters to be discussed in court.

By Mr. Veasey: Is your attitude in this case, you intend to have all this money paid out and deprive us of the right to determine whether or not that judgment you propose to make shall not be superseded?

By the Court: That is their judgment, not mine.

By Mr. Veasey: The decision of the Supreme Court is the question of possession and the question of improvements and every question of that kind can be determined by a legal action.

By the Court: The only thing was your rights on the premises by your machinery there and the question of absolute possession. I cannot say, you folks get off here—(interrupted by Mr. O'Meara)

By Mr. O'Meara: That is what you are doing.

By the Court: The judgment of the court is she is entitled
160 to the possession and entitled to all the fund and she is entitled to all the funds arising during the time you had it, because the Supreme Court said it was hers.

By Mr. O'Meara: Do you take the position that that is a matter upon which we do not have the right to supersede this court's construction of the mandate. In other words, is this court the final arbitrator in matters of that kind?

By the Court: No, the Supreme Court is the final arbitrator and has already decided it.

By Mr. O'Meara: The Supreme Court has not passed on what this court is attempting to adjudicate.

(At this point counsel retire to draw their journal entry, same to be presented to the court at 1:30 P. M. and the court takes up other matters.)

It now being the hour of 12:00 o'clock noon, the court takes a recess until 1.30 P. M. of this day.

And now at this time, it being first ascertained that all the officers of the court are present, court is reconvened pursuant to recess heretofore taken, at which time, the following proceedings were had.

161 By the Court—to Mr. O'Meara: Mr. O'Meara, have you seen this journal entry. (Indicating same.)

By Mr. O'Meara: I have, your Honor.

By the Court: Do you agree that that is what was agreed upon. That eliminated everything suspending judgment.

By Mr. O'Meara: Why everything in there except one thing—that is the appearance I had in there the other day—that our appearance was specially for the purpose of questioning the jurisdiction of the court. I stated that the other day, and all the time.

By the Court: Isn't that in there?

By Mr. Gregg: No, I didn't know anything about that.

By the Court: Is that in there?

By Mr. Tillotson: No, but he stated he was there for a special purpose.

By Mr. Gregg: Let's put it in the journal entry.

By the Court—to Mr. Gregg: Well, put it in there yourself, the court can not write.

By Mr. Gregg: All right. (Mr. Gregg here takes the
162 paper and begins to make the correction by interlineation after the words "O'Meara" "Appearing specially to challenge the jurisdiction of the court."

By Mr. O'Meara: To challenge the jurisdiction of the court.

By the Court: Put that in the original. I read it over and I remember Mr. O'Meara said that.

By Mr. O'Meara: Well, it is in the transcript the stenographer prepared.

By the Court: Well, I remember that you said that.

(Mr. Gregg here amends the original judgment.)

By Mr. Gregg: Now at the top of the second page there wants to be an "s" at the word "defendant".

By the Court—to Mr. O'Meara: In other words, you don't agree that is correct, but you agree that is what the court said?

By Mr. O'Meara: I agree that is as bad as it could be made.

By Mr. Gregg—to the Clerk of the Court: Now the amount in your hands is $12,048.00?

By the Clerk: Yes sir, and forty-eight cents.

By Mr. Gregg—to the Court: Now how about this last paragraph. (Referring to Journal entry.)

163 By the Court: I am going to pass upon that.

By Mr. Gregg: I have put in here that you deny it.

By the Court: I wan going to ask about that (reading part of paragraph) "And thereupon in open court the plaintiff moved the court to stay execution of its order for three days" and so forth. Well, I read that over—(interrupted by Mr. Tillotson)

By Mr. Tillotson: It was put in there so that could all be made the order of the court if that was it.

By the Court: I was going to ask you about that later on. I am not ready to decide that. No gentlemen, I find this in this cause. In the first place, the court is going *is* find and did find this morning, he was going to enter judgment in accordance with the mandate of the Supreme Court. It is true the recital in the journal entry will be more or less the finding of this court and the decision of the supreme court. Therefore, I take it, that the judgment in accordance with the mandate, will not be questioned by either plaintiff or defendant or by Martha Miller, but there may be some quibble as to what that decision of the Supreme Court really means. The court is of the opinion and he said this morning, that that is a final judgment against the plaintiff in the case and it being a final judgment,

Martha Miller is entitled to the possession and the court of
164 equity is without power to put her in possession; that she is entitled to the possession subject to the lease or her contract with the Alpha Oil Company and the only question or contention now as I view it before the court is whether or not the court will stay the judgment for three days and the only reason the court didn't decide it this morning was because he wanted to determine in his own mind as to whether or not that was a right the plaintiff was entitled to, or whether or not it was a discretionary matter with the court. The court is now of the opinion it is not a right of which the plaintiff is entitled, but it is a matter of discretion with the court.

In view of the fact that the judgme- of this court, his term of office will expire on the 11th day of this month, which will be Monday—he just as well say it will expire on the night of the 10th at 12 o'clock, for there will be no proceeding done in this court on the 11th by this judge and that the 10th is on Sunday. Consequently, the only working hours will be up to twelve o'clock on Saturday night. If the opinion of the Supreme Court means anything, it means that Martha Miller is not only entitled to the possession of that property and to handle it as her own from this date, but was entitled to it at the time of the institution of this suit, more than three years ago and that she as the allottee of this land, having been out of possession, without her money and without her rights for more than three years and that the plaintiff in this action has had since sometime in December, the latter part of December,

the mandate having been sent here on the 24th of December, I think, having had that right to have taken such action as
165 they saw fit, that it would be an abuse of discretion on the part of this court to suspend judgment further and let the order go from this date and it is so ordered and in addition to that, the clerk of this court will be ordered and directed to pay the money now in his hands as custodian and as the treasurer of this court in accordance with the journal entry, which is now being signed by this court. (At this point the court starts to sign the journal entry which is hereinafter shown.)

By Mr. O'Meara: I desire in the same capacity to make the further motion, if you can not extend it for the three days or suspend it for three days, will you suspend it until eleven o'clock tomorrow.

By the Court: If this court could extend it for one minute, he could extend it for one year. This court feels that the money does not belong to him or the clek and if this woman was entitled to it a year ago, she is entitled to *if not* and if entitled to it this minute, it should be paid to her this minute and not the next minute.

By Mr. O'Meara: This case is finally adjudicated?

By the Court: Yes sir, as soon as I sign the journal entry. And the Clerk is now hereby directed to issue checks in accordance with this journal entry which the *could* will now sign. (Court here finishes signing the journal entry.)

166 By Mr. O'Meara: I desire now to notify the court, after this matter has been finally disposed of, that we have filed in this court an action against the Clerk of this Court and against the Farmer's Bank & Trust Company, seeking to enjoin them from paying this money out and that we have served notice and had that matter set down for hearing; also that there will be and perhaps is now filed with the Chief Justice of the Supreme Court of the State, a petition for a writ of prohibition, prohibiting your Honor from enforcing this decree.

By the Court: Mr. Clerk, how long will it take you to write this check.

By the Clerk: Why as soon as I can look over and see what the judgment of the court is:

By the Court: State the hour that you want?

By the Clerk: Why I would like to have a couple of hours?

By the Court: You can not have it. It is now ten minutes until two o'clock. If by half past two o'clock these checks are not delivered in accordance with the order of the court, you will be in jail. Proceed and act in accordance with it.

(Here follows the minute of the clerk and the journal entry, which said entry is now duly signed and filed and which said journal entry together with the minutes of the clerk are in words and figures as follows, to wit:)

167 *Clerk's Minutes.*

No. 930. Jan. 8, 1915. Case heard by court. Plaintiff and defendants represented by counsel. The Court being fully advised renders judgment in accordance with the mandate of the Supreme Court and orders the Clerk of this court to pay out of the $12,880.00 deposited in this case, the sum of $10,456.00 *paid* the defendant Martha Miller; and the balance $2,424.00 to the defendant, Alpha Oil Company, as per journal entry.

168 . In the District Court of Rogers County, Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, a Corporation, Plaintiff,
vs.
MARTHA MILLER, née Everett, and ALPHA OIL COMPANY, a Corporation, Defendants.

Journal Entry.

Be it remembered, on this 8th day of January, A. D. 1915, the above entitled cause came on for hearing in the above entitled Court on the regular assignment of the docket for final judgment and disposition under the order and mandate of the Supreme Court of the State of Oklahoma, and the mandate of the Supreme Court of Oklahoma having been heretofore spread of record in this court in the above entitled cause. The plaintiff, Wellsville Oil Company appeared by its attorneys James A. Veasey and Jerry O'Meara, appearing specially to challenge the jurisdiction of the court, and the defendant, Martha Miller, appeared by her attorney, J. A. Hillotson, and the Alpha Oil Company appeared by its attorney, W. J. Gregg. Thereupon upon the application of the defendant, Martha Miller, for an order of this court distributing the money and funds now in the hands and custody of this court arising from the production and sale of oil from the premises in controversy in plaintiff's petition, described to wit:

169 South Half of the Southeast Quarter of Section 17—Township 24 North—Range 17 East—containing 80 acres, more or less;

the court finds: That as a result of the former order and judgment of this court entered in said cause on the 5th day of December, 1911, by agreement and stipulation of all parties to this cause, plaintiff and defendants there has come into the possession and under the control of this court, the sum of $12,880.00, arising from the sale of oil produced from the premises hereinbefore described during the pendency of this litigation, and that there is the further sum of

$8445.38 in the hands of the Prairie Oil & Gas Company, the proceeds of the sale of oil arising from the above described premises which by the terms of said stipulation and judgment of the court entered in pursuance thereof on the 5th day of December, 1911, is now subject to the order and disposition of this court. The court finds from the mandate and opinion of the Supreme Court of the State of Oklahoma rendered in this cause and the allegations in plaintiff's petition herein that the defendant Martha Miller is the owner of the real estate hereinbefore described, to wit:

South Half of the Southeast Quarter of Section 17—Township 24 North—Range 17 East, containing 80 acres, more or less;

and entitled to the possession thereof, subject to the right of the Alpha Oil Company under its oil and gas mining lease from the said Martha Miller, of date 29th day of February, 1908, and running for a period of fifteen years. That all of the moneys now in the hands of the Clerk of this court and the sum of $8445.38 in the
170 hands of the Prairie Oil & Gas Company are moneys arising from the sale of oil produced from said premises and that the plaintiff has no right, title or interest in any part of said moneys arising from the sale of oil and gas from said premises.

In accordance with the stipulation and agreement made in open court between Martha Miller and the Alpha Oil Company as to the division of said moneys now in the hands of the Clerk of this court and the Prairie Oil and Gas Company between the said respective parties defendants, it is ordered by the court that the clerk of this court pay to Martha Miller out of the funds now in his hands the sum of $10,456.00 and that the balance of the money in the hands of the Clerk, together with all sums of money in the hands of the Prairie Oil & Gas Company, be paid and delivered to the Alpha Oil Company.

And it is hereby ordered by the Court that the Prairie Oil & Gas Company pay over to the Alpha Oil Company all moneys now in its hands arising from the proceeds of oil or gas purchased by it from the lands hereinbefore described, in lieu of paying same into this court; and upon such payment the Prairie Oil & Gas Company be relieved from all further liability to either Martha Miller or the plaintiff herein.

The court further finds that the money now in the hands of the Clerk of this court is money put therein by agreement of parties and order of court and is subject at all times to the control of the court and is not money coming into the hands of the clerk under such conditions as would authorize him to collect a fee of 1% as
171 costs for the benefit of the county, and the Clerk of this court is hereby ordered to pay out said money under the order of this court without deducting any commission for collecting the same.

It is further ordered and adjudged by the court that the defendants, Martha Miller and Alpha Oil Company, have judgment against the plaintiff for their costs in this cause, taxed at $20.55.

To each, all and every of the above and foregoing findings of the

court the plaintiff, Wellsville Oil Company, duly excepted and still excepts.

And thereupon in open court the plaintiff, the Wellsville Oil Company, makes application to the court for leave to file a supersedeas bond to supersede the judgment and order of the court directing the distribution and payment of the money in the hands of the clerk and the Prairie Oil & Gas Company herein, which application for the right to file supersedeas bond was by the court denied. To which ruling and order of the court the plaintiff excepted and still excepts.

And thereupon in open court the plaintiff moved the court to stay execution of its order and judgment in this cause for a term and period of 3 days, to enable the plaintiff to apply to the Supreme Court of the State of Oklahoma for supersedeas bond herein; which application of the plaintiff for a stay of judgment for a term of 3 days is hereby by the court denied. To which order and ruling of the court, the plaintiff excepted and excepts.

(Signed) T. L. BROWN,
District Judge.

172 Endorsed: #930 Civil. Filed Jan. 8, 1915. (Signed) C. T. McClellan, Court Clerk, by E. C. Feland, Deputy.

173 In the District Court of Rogers County, Second Judicial District, State of Oklahoma.

No. 930.

WELLSVILLE, OIL COMPANY, Plaintiff,
vs.
MARTHA MILLER et al., Defendants.

The within and foregoing case made and record contains a full, true, complete and correct copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, all the orders and rulings made and exceptions allowed and all of the records upon which the judgment and journal entry in said cause were made, and the same is a full, true, complete and correct case made.

174 In the District Court within and for the Second Judicial District, County of Rogers and the State of Oklahoma.

No. 930.

WELLSVILLE OIL COMPANY, Plaintiff,
vs.
MARTHA MILLER et al., Defendants.

Certificate of Reporter.

I, G. U. McKinney, the duly appointed and acting reporter of the Second Judicial District, State of Oklahoma, do hereby certify that

the above and foregoing transcript of the evidence and pleadings in the above styled and numbered cause contains a true, full, complete and literal transcript of all the testimony and evidence taken in said cause at the trial thereof, together with all the proceedings, orders, objections, rulings of the court thereon and all testimony offered and tendered in said cause by the respective parties and also including a true and correct copy of the pleadings in said cause on file.

In Testimony Whereof, I have hereunto subscribed my name this 16th day of January, A. D. 1916.

G. U. McKINNEY,
District Court Reporter.

175 In the District Court within and for the Second Judicial District, County of Rogers and State of Oklahoma.

No. 930.

THE WELLSVILLE OIL COMPANY, Plaintiff,
vs.
MARTHA MILLER et al., Defendants.

Acceptance, Service, etc., of Case-made.

We, the undersigned hereby certify that the foregoing case made contains a full, true, complete and correct copy of the transcript and all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered or introduced by both parties, all orders and rulings made and exceptions allowed and all of the record upon which the judgment and journal entry in said case were entered, and that the same is a full, true, correct and complete case made.

Witness our hands this the 19 day of Jan. A. D. 1915.

L. A. ROWLAND,
SHERMAN, VEASEY & O'MEARA,
Counsel for Plaintiff in Error.

We, the undersigned, attorneys for Defendants in error in the foregoing suit, certify that the foregoing case made was duly served on us on this the 21 day of Jan. A. D. 1915.

TILLOTSON & ELLIOTT,
Counsel for Defendant in Error Martha Miller.

We, the undersigned, attorneys for Defendants in error in the foregoing suit, certify that the foregoing case made was duly served on us on this the 20 day of January, A. D. 1915.

W. J. GREGG,
Counsel for Defendant in Error Alpha Oil Company.

tempted to raise a Federal question in the courts of California because, it was claimed by the Life Insurance Company, that full faith and credit was not given to the judgment of the Hawaiian court; in other words, the Life Insurance Company attempted to plead in the California courts a judgment against them in the Hawaiian courts which they claimed was *res adjudicata;* but this court, if I understand the decision correctly, held that because of the fact that the alleged question was not squarely presented to the lower court, that it could not be therefore raised in this court for the first time. That case is somewhat analogous to the one at bar, although the plaintiff set up the judgment as an exhibit to the petition in the lower court, the question has never before been raised, to the writer's knowledge, prior to the filing of the petition for re-hearing in the State Supreme Court, that any Federal question was involved in this transaction.

This court further stated in the text of the opinion in *Mutual Life Insurance Company* v. *McGrew, supra*:

> "Where a judgment of any state is pleaded in defense and issue is made upon it, it may well be ruled that that sets up a right under the third subdivision, because the effect of the judgment is the only question in the case; but here the plea of the decree of divorce and the statute did not necessarily suggest or amount to a claim under the treaty. They were prop-

erly admitted in evidence under the state law for what they might be worth as a defense, but that did not involve the assertion of an absolute right under the treaty."

Now, can it be said that the *effect of the judgment* in the United States Court for the Northern District of Indian Territory in approving the lease to the plaintiff, was the only question involved in the case? The record before us shows that the court did not consider that question at all, but the two questions which it did consider did not affect that judgment one way or another; the two questions which the court did consider were:

(1) Whether or not the plaintiff came into court with clean hands.

(2) Whether or not the plaintiff complied with the order of the court in approving said lease, by having the same approved by the Secretary of the Interior. That part of the order approving the lease (Printed Record, page 21) reads as follows:

"It is therefore Considered, Ordered and Adjudged by the court that Calvin Everett, guardian of the person and estate of the above named minor, Martha Everett, be, and he is hereby authorized and empowered to join with the said Martha Everett in the execution of an oil and gas mining lease on the allotment of the said Martha Everett to the Wellsville Oil Company, a corporation of Wellsville, New York, which said lease shall be executed in conformity with the regulations of the Secretary of the Interior, reserving a royalty of 12½%

continuing for 15 years from its date, and for which lease the guardian shall receive a bonus of $20 per acre for the use and benefit of said minor, which said bonus shall be deposited in the Union Bank & Trust Company, Chelsea, Indian Territory, there to be and remain in escrow until the approval of said lease by the Secretary of the Interior.* * * * It is further ordered and adjudged by the court that upon the approval of the lease herein authorized by the Secretary of the Interior, that the lease hereinbefore authorized by the court and order of the court authorizing the same, as well as the order of the court confirming the same on April 5, 1905, stand vacated and be of no further force and effect."

The Supreme Court of Oklahoma, in its opinion (Printed Record, page 47) says:

"The record shows that the plaintiff has not only come into court with unclean hands, but has been guilty of iniquity as well. * * * We cannot agree with the contention of the plaintiff in error that this provision in the order authorized the lease, providing that it should be subject to the approval of the Secretary of the Interior and should be executed in accordance with the rules and regulations prescribed by him and directing the guardian to make a full report when the order has been complied with, and providing for the bonus to be placed in escrow in the bank until the Secretary of the Interior approved the lease, were mere idle and useless provisions. We rather think they had a fixed and set purpose understood by the court and the parties at that time and that the provision requiring the approval of the Secre-

tary of the Interior was intended as a condition precedent to be complied with in order to complete the execution of the lease contract, and that not having been complied with, the contract was not complete, and no estate vested in the lessee thereunder."

In the case at bar, as was stated by this court in the McGrew case, the decision on the question on the plaintiff in error coming into court wtih clean hands, and of the lease being executed in conformity with the regulations of the Secretary of the Interior under said order, did not necessarily suggest or amount to a claim of failure of the State Court to give effect to the judgment of the United States Court for the Northern District of the Indian Territory.

On the question of whether or not the United States Court for the Northern District of the Indian Territory was a United States court, within the terms of the first subdivision of Section 709 of the Revised Statutes of the United States, I do not think it necessary for me to make any argument whatever in reply to that of counsel for plaintiff, this court already having thoroughly settled the question in numerous cases as to the territorial courts.

On the question of jurisdiction of the United States court for the Northern District of the Indian Territory to make and enter an order authorizing

and approving the lease to the plaintiff. (Record, pages 18, 19, 20, 21 and 22.)

Under the facts as they appear from said record I go further than the Supreme Court of Oklahoma in its opinion did and announce the proposition that said United States Court did not have jurisdiction to make and enter the order it did make, authorizing a lease beyond the majority of the minor in this particular case, who was a full blood Indian; and in making this assertion I am not unmindful of the fact that the Supreme Court of the State of Arkansas, and the Supreme Court of the State of Oklahoma, have held that a guardian may make a valid oil and gas mining lease upon the allotment of his ward for a longer period of time than the majority of said minor. The doctrine has been announced by the Supreme Court of Arkansas in the case of *Bertig* v. *Beauchamp,* 90 Ark. 357, 119 S. W. 75, and also by the Supreme Court of Oklahoma in the case of *Houston* v. *Cobleigh,* 119 Pac. 416; *Cabin Valley Mining Co.* v. *Gaul,* 155 Pac. 570, and also by the Circuit Court of Appeals for the Eighth Circuit in the case of *Mallen* v. *Ruth Oil Co.,* 231 Fed. 845. I concede that the law of Oklahoma and Arkansas is such that a valid lease can be procured from a guardian upon proper showing, for a longer period of time than the minority of the ward, in a case where the minor or his allotment is not restricted by governmental restrictions. An examination of the records in the case of *Houston*

v. *Cobleigh* will show that the lease in that case was approved by the Secretary of the Interior, as well as by the court, and thereby any question of restrictions is eliminated. In the case of *Cowles* v. *Lee,* decided by the Supreme Court of Oklahoma, 128 Pac. 688, was a case where there were no restrictions upon the minor's allotment and the same thing was also true in the case of *Cabin Valley Mining Co.* v. *Gaul,* 155 Pac. 570. In the case of *Mallen* v. *Ruth Oil Co.,* the decision by the Circuit Court of Appeals for the Eighth Circuit, there were no restrictions on this land, and the point I now contend for was not decided by Judge Adams, who wrote the opinion. He said: "Although the ward was an Indian, the question is not embarrassed by any Indian estate or law specially applicable to Indians, but is one of general law." In the case at bar Martha Everett, the allottee and minor, was a full blood Indian, as is shown by the form of the lease used by the plaintiff (Printed Record, page 22) and also by the finding of the Supreme Court of Oklahoma (Printed Record, page 39).

> "Martha Miller, nee Everett, a full blood minor of the Cherokee Nation."

Section 15 of the Cherokee Treaty, 32 Stat. L. 716, provides as follows:

> "All lands allotted to members of said tribe except such land as is set aside to each for homestead, as herein provided, shall be alienable after five years after the issue of patent."

Section 72 of the same treaty provides in part as follows:

> "Cherokee citizens may rent their allotments * * * * for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; or lease for a longer period than one year for grazing purposes, and for a longer period than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible to ratification in any manner and no rule of estoppel shall ever prevent the assertion of its invalidity. * * *"

The Act of April 26, 1906, 34 Stat. L. 137, Section 19, provides that:

> "No full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have the power to alienate, sell, dispose of or encumber in any manner any of the land allotted to him for a period of 25 years from and after the passage and approval of this act, unless such restrictions shall, prior to the expiration of said period, be removed by Act of Congress. * * *"

Section 20 of the same act provides:

> "That after the approval of this act all leases and rental contracts, except leases and rental contracts not to exceed one year for agricultural purposes, for lands other than

homesteads of full blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, shall be in writing and subject to the approval of the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, that allotments of minors and incompetents may be rented or leased under order of the proper court. * * *"

The Act of May 27, 1908, 35 Stat. L. 312, provides in part as follows:

"* * * * All allotted land of enrolled full bloods * * * including minors of such degree of blood, shall not be subject to alienation contract to sell, power of attorney, or any other encumbrance, prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part under such rules and regulations concerning the terms of sale and disposition of the proceeds for the benefit of the respective Indians as he may prescribe."

Section 2 of the same act provides:

"That all land, other than homesteads allotted to members of the Five Civilized Tribes, from which restrictions have been removed, may be leased by the allottee, if adult, or by guardian or curator, under proper order of the Probate Court, if a minor or incompetent, for a period not to exceed five years, without privilege of renewal, provided that lease of restricted lands for oil and gas, or other mining purposes * * * * may be made with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise. * * *"

Section 5 of the same act provides as follows:

> "That any attempt at alienation or encumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of encumbrance of real estate, made before or after the approval of this act which affects the title to the land allotted to an allottee of the Five Civilized Tribes, prior to the removal of restrictions therefrom, and all any lease of such restricted land in violation of the law, before or after the approval of this Act, shall be absolutely null and void."

It will therefore be noted from the foregoing Acts of Congress that the allotment of Martha Miller, being the land involved in this controversy, was and is under restrictions for a period of years yet to come, and while it may be true under the decision of the Circuit Court of Appeals in the case of *Morrison* v. *Burnett*, 154 Fed. 617, that the Secretary of the Interior did not have any authority to approve or disapprove a minor lease (although I doubt seriously this question), still, the Morrison v. Burnett doctrine would not be effective in this case for the following reasons:

The United States Court for the Northern District of the Indian Territory had no authority under Section 20 of the Act of April 26, 1906, except over the allotments of *minors and incompetents;* the act did not give the court authority over allotments of *adults*, and for the sake of argument, it

may be admitted that under the law as it stood at that time, the court had jurisdiction to approve oil and gas mining leases on the allotments of minors and incompetents, and it was not necessary to obtain the approval of the Secretary of the Interior, unless, of course, the order of court required this to be done as a condition precedent to the execution of the lease; that the allotments of *adult* full blood allottees were under the sole control and jurisdiction of the Secretary of the Interior. The United States Court for the Northern District of Indian Territory did approve an oil and gas mining lease on the allotment of Martha Miller, during the period of her minority, and that order remained in full force and virtue, and was to be set aside only when the Secretary of the Interior had approved the lease of the plaintiff in controversy (Printed Record, pages 21-22).

Therefore, the court had exercised its jurisdiction up to the full limit. It was not a case of extending a lease already made, but was a making of an entirely new lease. Besides that, when the minor reached her majority, she was no longer under the guardianship and supervision of the *court*, but had a new guardian, so to speak, that is, the *Secretary of the Interior*. Congress had specially provided that the Secretary of the Interior should have sole and exclusive jurisdiction and control over the allotments of *adult full blood Indians*, and

the *court* not having any jurisdiction over adult full bloods, when it attempted to exercise jurisdiction for a longer period of time than the minority of its ward, it made an absolutely *void order,* because it would be immaterial what kind of an order it made, unless the Secretary of the Interior approved the lease of the adult, it would have been ineffectual to convey any title to the allotment. During her minority, Martha Miller was unable to make a valid contract except through her guardian and then with the approval of the Probate Court. The court acts somewhat in a dual capacity of authorizing the minor (through her guardian) to make a contract, the same as though she were of age, and, second, of removing the restrictions from her allotment for the purpose of executing an oil and gas mining lease. After she became of age, being a citizen of the United States, and of contractual age, the only restrictions imposed against her making a valid contract were the restrictions against the land itself, and these restrictions were that no valid contract could be made except with the approval of the Secretary of the Interior. The court did not have the authority to approve the lease on the lands of this minor for a longer period than her minority and a court of equity will not do a vain and useless thing, and if the Secretary of the Interior should disapprove a lease which the court authorized for this period of time, then the lease would be ineffectual and void, and it would thereby de-

feat the judgment of a court of ordinarily competent jurisdiction; that was exactly what was done in the case at bar. The lease was disapproved by the Secretary of the Interior (Printed Record, page 27).

The authority conferred by the court's approval extending beyond the minority, went purely as to the grantor's *right* to contract and its effect would be the same as though the minor signed the contract after reaching her majority, and if at that time she could not make valid lease without approval of the Secretary of the Interior, then the court could not do so for her.

There is another reason why this court is without jurisdiction over the judgment which the plaintiff attempts to plead in this case, and that is this: The courts all attempt to uphold the judgments of another court that had jurisdiction of the parties, and the subject matter upon the proposition of the judgment being *res adjudicata;* but that cannot be in this case for the reason that the Wellsville Oil Company, plaintiff here, are not purchasers at a judicial sale under decree of the United States Court, and further it was not a party to the proceedings by the guardian to lease said tract of land, and therefore, it could not plead the judgment on the theory of *res adjudicata.*

The plaintiff's further position with regard to said judgment is that by failing to give to the judg-

ment the validity claimed for it by the plaintiff, that we are making a collateral attack thereon. It is generally true that a judicial sale judgment cannot be attacked collaterally, but there are exceptions to the rule where the judgment shows upon its face facts that show it to be without jurisdiction, then it can be collaterally attacked.

The Supreme Court of Oklahoma, in a recent and very well considered case, draws very clearly to my mind the distinction between an attack on a judgment collaterally, where the court had jurisdiction, and an attack collaterally where the court was without jurisdiction. In the case at bar it is clear that the United States Court for the Northern District of the Indian Territory did not have juristion to approve an adult lease, and in view of the fact that the said court had already approved a lease during the entire term of Martha Miller's minority, and also not having any jurisdiction to approve a lease after she reached her majority, it seems clear that the judgment of said court was entirely without jurisdiction, and that, therefore void, and the same could be attacked collaterally, or any other way. The recent case to which I refer, in the Supreme Court of Oklahoma, was that of *Roth et al* v. *The Union National Bank of Bartlesville, Okla.,* reported in 160 Pac. 505. That was a case where the guardian filed a petition in the County Court of Washington County, Oklahoma, praying for authority to execute a mortgage upon

the allotment of his ward, to the Union National Bank, under the statutes of Oklahoma, which authorizes a mortgage for such amount as may be necessary to pay the then existing debts and liabilities. At the time of the accrual of these debts the land of the allottee and minor was restricted by the Acts of Congress, which forbade the encumbrance or sale of allotments for any debt or obligation created prior to the removal of restrictions. The County Court made an order authorizing the execution and delivery of the note and mortgage by the guardian, and subsequently a petition was filed in the District Court asking for the foreclosure on the note and mortgage. To that foreclosure action the defendant, who had then become an adult, filed her answer, setting up the fact that the County Court was without authority or jurisdiction to order the guardian to execute and deliver the said mortgage for the reason that the said debt was contracted, and arose, prior to the time that the restrictions were removed from her allotment. A demurrer was filed to this answer in the District Court and sustained, and thereupon the minor, who had then become of age, elected to stand upon said answer and defense and the judgment was entered foreclosing the mortgage under the theory that the judgment of the County Court, ordering the said property mortgaged by the guardian, was a judgment of a court of general jurisdiction, and that no appeal having been taken from said judgment,

that it was final, and not subject to collateral attack. The Supreme Court reversed the lower court and held that while the judgments of the County Court were judgments of a court of general jurisdiction and were not subject to collateral attack, in matters where the said court had jurisdiction, still that if it appeared from the record before the said county Court that said court was without jurisdiction, that the same would be subject to collateral attack anywhere. In this case Justice Thacker elaborated on the opinion of this court in the case of *Grignon* v. *Astor*, 2 How. 319, 11 L. Ed. 283. The court in the body of the opinion said:

> "This case is one of collateral attack upon the guardian's conveyance; it shows that the decree is void and therefore subject to collateral attack whenever it *affirmatively* appears from the record proper that the court was without jurisdiction.
>
> It is clear that the County Court could acquire no jurisdiction to determine whether defendant's allotted lands should be mortgaged to secure indebtedness for which it was not subject to be mortgaged by reason of Section 4 of the Act of Congress of May 27, 1908, effective on and after July 27, 1908; and the orders authorizing and approving the mortgage to secure a portion of the indebtedness which affirmatively appeared from the guardian's application therefor, to have arisen and existed prior to that date, being within the

inhibition of that act, is beyond the power of the court, and therefore void and subject to collateral attack to the extent of that part of the indebtedness."

In the case at bar it cannot be successfully contradicted that the land embraced within the plaintiff's lease was restricted land, and that the lease of such land could only be made by the allottee, with the approval of the Secretary of the Interior. It was manifest from the record before the said United States Court for the Northern District of Indian Territory, that Martha Miller was a full blood Cherokee Indian and that she would reach her majority on the 17th day of March, 1908; that the oil and gas mining lease had been made by the guardian and approved by said court, up to the 18th day of March, 1908, and therefore the court not having any jurisdiction over adult leases, and that the Secretary of the Interior, having specific authority under the Act of Congress, to approve or disapprove them, it is perfectly clear to my mind that the said United States Court did not have any authority to make the specific order in controversy, and although the attack be collateral on the judgment, still it is permissible from the fact that the court did not possess the power and jurisdiction to make the order which it attempted to make, and therefore the same was and is absolutely void.

ARGUMENT ON MERITS.

I shall not attempt to answer all the arguments advanced by the plaintiff, under what he terms the merits of the case, because I think that it is useless, and that this case only involves, stripped of all of the incidental questions raised by counsel for the plaintiff, and eliminating any question of jurisdiction, purely and simply a question of a want of equity in the petition, and if so, even though there were Federal questions involved, the judgment of the lower court was properly decided, and should be affirmed here.

Want of Equity.

Now, let's consider for a moment the question of whether or not the demurrer to the amended petition should have been sustained or not. It is contended by the defense that, this being a suit in equity, that following the usual maxim in such cases, that the plaintiff was required "to come into court with clean hands."

We do not believe that there can be any dispute but the findings of fact of the State Supreme Court on a writ of error is final. "In cases coming from a State court, we do not review questions of fact, but accept the conclusions of the State tribunal as final." *Chrisman* v. *Miller,* 197 U. S. 319, 49 L. Ed. 772; *King* v. *West Virginia,* 216 U. S. 100, 54 L. Ed. 401. And if this be true, the finding of fact in the

court below, outside of the legal proposition, would be and is sufficient to defeat the plaintiff's recovery. The court below found as fact (Printed Record, page 47) as follows:

> "The record shows that the plaintiff not only came into court with unclean hands, but has been guilty of iniquity as well."

It may be contended, however, that this was a mere legal conclusion drawn from the record, and was not therefore strictly a finding of fact, and if not, that this court would not be found by it as such finding of fact, but that this court would examine the record for itself to determine whether or not the plaintiff came into court with clean hands. It appears from the Printed Record (page 19) as follows:

> "That on or about the 5th day of April, 1905, and under proper order of court, your petitioner executed an oil and gas mining lease on the above described land to Sydney R. Bartlett, Edwards H. Smith, of Independence, Kansas, which said lease was to continue for the minority of said minor.
>
> The said lease was subsequently approved by the Secretary of the Interior, and that recently the Secretary of the Interior has approved an assignment of said lease to the Wellsville Oil Company, a corporation of Wellsville, New York, and that since the approval of said lease the said Wellsville Oil Company of Wellsville, New York, operating first under a drilling contract, and secondly

under a duly approved assignment, has drilled seventeen wells on said land, all but two of which were producing wells; that owing to the fact that said lease is to continue for a period of but about one year the said Wellsville Oil Company, in order to protect itself, began in the month of November, 1906, to pump all of said wells both day and night, to such an *excessive extent* that said company will probably secure the greater part of the oil underlying said lease before said lease expires; that the price of oil is so exceedingly low at this time that your petitioner believes it is a great damage and loss to the estate of said minor to have such operations of said lease rushed to the extent now being done, and believes that a more gradual production of said oil would enable said minor to receive the benefit of anticipated increase in price to be received for said oil; * * * * that it is absolutely necessary to the preservation of the estate of said minor of said oil that said excessive pumping be discontinued."

In pursuance of this petition the court made the following finding of fact (Printed Record, page 21):

"(4) That owing to the fact that said lease is to endure for such a short time, said Wellsville Oil Company is pumping said producing wells both day and night to such *excessive and unreasonable extent* that a greater part of the oil underlying said land will be exhausted by the time said lease terminates.

(5) That the price now paid for crude petroleum is so low that it is not to the interest of said minor to have the oil produced in the

quantities now being done, but said oil should be pumped in a usual and normal manner, so that the production from said wells shall extend over a considerable period and said minor receive the benefit of said price as she may obtain in crude oil.

(6) Said Wellsville Oil Company is willing to stop the unusual and excessive pumping of oil from the said land provided it receives a lease for oil and gas mining purposes.

(7) That the making of a lease on the allotment of said minor under the terms hereinbefore set out would be to the advantage of the estate of said minor, and great and irreparable loss will result to said estate were said proposition not accepted."

I do not believe that it can be doubted from this finding of fact, that any chancellor or court of equity, that the plaintiff was wanting in good faith, honesty and righteous dealing, and that it had breached its duty by this *excessive and unreasonable pumping,* and thereby forcing the guardian to petition for authority to make a new lease. Can it be said that one can take advantage of his own wrong? I think not. The rule is too well settled in this country to admit of any doubt. The plaintiff's amended petition in substance alleges that it had a lease upon the land of the defendant in error for a period of time expiring with her minority and realized that they would lose a good piece of property unless they were able to get a new lease, and commenced to try to pump the land dry by run-

ning pumps both night and day. They ran it this way for several months; they then told the guardian that they would quit pumping them that way if he would get them a new lease, thereby forcing him almost by duress to go into court and ask the court to approve a new lease to them. If this was not taking advantage of their own wrong, I am frank to say that I am at a loss to know what the term means. The very right of action set out in the first count of the amended petition is based upon a breach of duty of the plaintiff by the wrongful operation of the first lease.

Mr. Justice Vandeventer, while on the Circuit Court of Appeals for the Eighth Circuit, in the case of *Brewster* v. *Lanyon Zinc Company*, 140 Fed. 801, speaking with reference to the contractual duties of lessor and lessee as to development of an oil and gas mining lease, said:

> "In the absence of some stipulation to that effect, we think an oil and gas lease cannot be said to make the lessee the arbiter of the extent to which, or the diligence with which the exploration and development shall proceed. * * * * The object of the operations being to obtain a benefit or profit for both lessor and lessee, it seems obvious, in the absence of some stipulation to that effect, that neither is made the arbiter of the extent to which or the diligence with which the operations shall proceed, and that both are bound by the standard of what is reasonable. This is the rule of all other contracts where the time, mode or qual-

ity of performance is not specified, and no reason is perceived why it should not be equally applicable to oil and gas leases."

And again, in the course of the same opinion, it is said:

> "Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of *both lessor and lessee, is what is required.* A plain and substantial disregard of this requirement constitutes a breach of the covenant for the exercise of reasonable diligence, which, as before shown, is also made a condition of the lease under consideration."

The Supreme Court of the State of Oklahoma in the case of *Indiana Oil, Gas and Development Co.* v. *McCrory,* 140 Pac. 610, in the opinion given by Commissioner Galbraith, lays down this doctrine:

> "Where by the operation contemplated by an oil and gas lease is to obtain benefit or profit for both the lessor and lessee, neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which, or the diligence with which, the operation shall proceed; and both are bound by the standard of what in the circumstances would reasonably be expected of an operator with ordinary prudence, having regard to the interests of both."

It is admitted that the old lease of the Wellsville Oil Company was under the supervision of

the Department of the Interior. The allegations of the plaintiff's petition, being in part as follows:

> "Second: That on the 5th day of April, 1905, under proper order of court, a lease for oil and gas mining purposes was executed on the allotment of said minor to Sidney R. Bartlett and Edwards H. Smith, of Independence, Kansas, which said lease has been subsequently assigned to the Wellsville Oil Company, of Wellsville, New York, with the approval of the Secretary of the Interior.
>
> Fourth: That owing to the fact that said lease is to endure such a short time, said Wellsville Oil Company is pumping said producing wells both day and night, to such an *excessive and unreasonable extent* that the greater part of the oil underlying said land will be exhausted by the time said lease is terminated.
>
> Fifth: That the price now paid for crude petroleum is so low that it is not to the interest of the estate of said minor to have said oil produced in the quantities now being done, but that said oil should be pumped in a usual and normal manner, so that the production of said wells shall extend over a considerable period and said minor receive the benefit of such *advance in price* as she may obtain in the case of crude oil."

and therefore this court will take judicial notice of the contents of the lease contract under which it was operating because of the fact that said contract is fully set out in the regulations of the Department of the Interior. See case of *Caha* v.

United States, 152 U. S. 221, 222. Part of the contract of lease to Wellsville Oil Company, under which it was operating, and which is shown by the regulations of the department, is as follows:

> "The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to operate the same in a workmanlike manner to the fullest possible extent, unavoidable casualties excepted; to commit no waste upon said land, and to suffer no waste to be committed upon the portion in its occupancy or use; to take good care of the same, and to promptly surrender and return the premises upon the termination of this lease to the party of the first part, or to whomsoever shall be lawfully entitled thereto, and not to remove therefrom any buildings or improvements erected thereon during the said term by the said party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, excepting that tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery and the casing of all dry or exhausted wells, shall remain the property of the said party of the second part, and may be removed at any time before the expiration of sixty days from the termination of the lease; that it will not permit any nuisance to be maintained on the premises under its control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; that it will

not use such premises for any other purpose than that authorized in this lease, and that before abandoning any well it will securely plug the same so as to effectually shut off all water above the oil bearing horizon."

The United States Court found that the Wellsville Oil Company "is pumping said producing wells both day and night to such an *excessive and unreasonable extent* that the greater part of the oil underlying said land will be exhausted by the time said lease terminates." Therefore it is clear that the Wellsville Oil Company was not acting honestly with the lessor, as it was taking more oil than it was legally entitled to and therefore breaching its contract. From this it appears that the plaintiff was wanting in good faith, honesty and righteous dealing. Clearly it was not operating said lease in a workmanlike manner, but was committing waste on said land by taking oil therefrom in an excessive quantity, under the circumstances; further "it agreed to take good care of said land and promptly surrender and return the premises upon the termination of the lease"; although it did not have a valid contract, it did not return the aforesaid premises at the expiration of the contract; by violation of the contract it remained in possession. This possession was wrong.

As I understand the law in regard to maintaining an action to quiet title such as this was, it is necessary to have possession of the property

and in equity the wrongful possession of the property will not avail the plaintiff; in fact, it would be equivalent to no possession. The law of Oklahoma on the question of possession in an action to quiet title at the time this action was commenced, is as follows:

> "An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, or interest therein, adverse to him, for the purpose of determining such adverse estate or interest." Laws of Okla., 1893, Sec. 4491.
>
> "The possession that gives jurisdiction in actions to quiet title, whenever possession is a jurisdictional fact, must be such as was acquired in a legal manner, and hence possession wrongfully obtained, whether by force or fraud, will not suffice." 32 Cyc. 1141-1142.

In the case of *Hardin* v. *Jones*, 86 Ill. 313, speaking of the question of possession wrongfully obtained, the court said:

> "Equity will not lend its aid to protect possession wrested by the complainant from another by fraud or violence is a wrongful act affording no foundation for equitable jurisdiction and relief."

The same court in the case of *Comstock* v. *Henneberry*, 66 Ill. 212, said:

> "If the complainant is in actual possession of the land at the time he exhibits his bill, but

such possession was wrongfully obtained, he will not be allowed to take advantage of his own wrong and will be considered in equity as out of possession, so far as the question of jurisdiction is concerned; and by taking possession he has complete remedy at law and a court of equity cannot entertain his bill."

Bigelow v. *Sanford,* 57 N. W. 1037.

"Where a purchaser takes possession without resorting to ejectment, but instead makes an agreement with tenant in possession, by which the latter takes a lease from him in order to proceed in chancery to prevent a jury from passing on the good faith of the purchaser, such possession acquired by sharp practice will not entitle him to maintain a bill to quiet title."

Stetson v. *Cook,* 39 Mich. 750.

Contract Between Parties.

A careful examination of the plaintiff's petition will show that the alleged right of action is based upon a certain contract of lease made and entered into between the plaintiff and the guardian of Martha Miller, as is shown by Exhibit "C" at pages 22, 23, 24, 25, 26 and 27 of the printed record. Here we have a contract made by the guardian and the minor with the plaintiff, Wellsville Oil Company, and by said plaintiff duly accepted and executed, and we find in this contract that the Wellsville Oil

Company agreed with said Martha Miller and her guardian as follows:

> "In consideration of which the party of the second part hereby agrees and binds itself, its heirs, successors and assigns to pay or cause to be paid to the United States Indian Agent, Union Agency, Indian Territory, for the lessors, as royalty, the sum of 12½% of the gross proceeds, on the leased premises, of all crude oil extracted from said land * * * * and the party of the second part further agrees and binds itself, its heirs, successors and assigns, to pay, or cause to be paid to the said agent, for lessors, as advanced royalty on this lease, the sum of money as follows, to-wit: * * * * and further that should the party of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, the Secretary of the Interior after ten days' notice to the parties, may declare this lease null and void and all royalties paid in advance shall become the money and property of the lessors." (Printed Record, page 23.)

> "* * * * but the lessee may be required to immediately develop the tracts leased, should the Secretary of the Interior determine that the interests of the lessors demand such action.

> The party of the second part further agrees to carry on operations in a workmanlike manner to the fullest possible extent, unavoidable casualties excepted; to commit no waste on said land, and to suffer no waste to be committed upon the portion in its occupancy or use; to take good care of the same, and to

promptly surrender and return the premises upon the termination of this lease * * * and not to remove therefrom any buildings or permanent improvements erected thereon during the said term by said party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration of this lease. (Printed Record, page 24.)

"And it is mutually understood and agreed that this indenture of lease shall in all respects be subject to the rules and regulations heretofore, or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Cherokee Nation, and that this lease or any interest therein, shall not by working, drilling contract or otherwise, or the use thereof directly or indirectly, be sublet, assigned or transferred without the consent of the Secretary of the Interior first obtained, and that should it or its sublessees, heirs, executors, administrators, successors or assigns violate any covenant, stipulation or provision of this lease, or the regulations * * * * then the Secretary of the Interior, after ten days' notice to the parties hereto shall have the right to avoid this indenture of lease and cancel the same, when all the rights, franchises and privileges of the lessee, sublessee, heirs, executors, administrators, successors or assigns hereunder shall cease and end without resort to the court and without further proceedings, and the lessor shall be entitled to immediate possession of the leased land and the permanent improvements thereon." (Printed Record, pages 24-25.)

"And it is further expressly agreed that this lease is made with the full knowledge of the fact that under the regulations prescribed by the Secretary of the Interior governing the leasing of lands in the Cherokee Nation, Indian Territory, lessees are prohibited from being directly or indirectly interested in leases, in their own names, or in the names of the persons, or as owners or holders of stock in corporations, or as members of associations, covering an aggregate of more than 4,800 acres of land in the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, that the said prohibition is made as a part and condition of this lease, and that the Secretary of the Interior reserves the right to cancel leases at any time during the period which they are to run, after notice as herein mentioned, when he is satisfied that the terms of the lease or of the regulations heretofore or hereafter prescribed have been violated in any particular, and it further agrees not to transfer, assign or sublet, by working or drilling contract or otherwise, or to allow the use of the land leased, or any oil or gas in or under it, without first obtaining the consent of the Secretary of the Interior, and that any violation of the lease or of the regulations heretofore or hereafter prescribed by the Secretary of the Interior, respecting oil and gas leases in the Cherokee Nation shall render this lease subject to cancellation, after the ten days' from receipt by it of notice, in the discretion of the Secretary of the Interior, whose declaration of cancellation shall be effective without resorting to the court and without further proceedings, and that the lessor shall then be entitled to immediate possession of the land."

(Printed Record, page 25.)

> "It is further agreed and understood that the approval of this lease shall be of no force or effect, unless the party of the second part furnish, within sixty days from the date of approval of the application filed in connection herewith, a bond to the satisfaction of the Secretary of the Interior, in accordance with the regulations of July 7, 1906." (Printed Record, page 26.)

It will be noted that the contract not only requires that the same shall be *approved* by the Secretary of the Interior before it shall be binding, but it makes the provision for the Secretary of the Interior to be arbiter of any differences between the parties, and in fact makes the Secretary of the Interior the tribunal to determine when said lease shall be cancelled or shall expire.

The Wellsville Oil Co made this lease contract, and the presumption is that it was drawn at their own instance and request, and having been drawn up by them, the presumption would be against them the same as it is against a life insurance company on the construction of a life insurance contract; that is, the Wellsville company having prepared and delivered to the guardian a lease contract such as they desired, containing the covenants to which I have heretofore referred, and providing that it should not be valid unless approved by the Secretary of the Interior, they are bound thereby. It seems clear to me that a court of equity would not

interfere with the parties by stepping in and making a new contract for the Wellsville Oil company, but that it would leave it where it found it. To use the slang expression, "If they have made their bed hard, let them lie on it." Here they have made a solemn contract by which they provide that it is subject to the approval of the Secretary of the Interior. They took the contract and filed it with the Secretary of the Interior, and asked for its approval. "The court takes judicial notice of the rules and regulations of the department." *Caha v. United States*, 152 U. S. 211-222. This being the law, this court will take judicial notice of the fact that the Secretary of the Interior requires lessees to make formal application for the approval of lease contracts and to submit a bond to the department before it will take action on a lease. The applicaion for approval of a lease filed by a lessee not only applies for the approval of the lease, but also provides that the application shall be considered a part of the lease, and that the lease is taken in good faith, and it is necessary that such application be sworn to before being filed.

Therefore, before the Wellsville Oil company filed its lease with the Department it was necessary for it to file its application asking that the same be approved and stating that the lease was taken in good faith. So long as it seemed to the Wellsville Oil company that it would be approved by the Secretary of the Interior, they were perfectly will-

ing to stand upon it as their contract and were perfectly willing that the Secretary of the Interior should have jurisdiction, and whether he had the right to approve or disapprove it, when the parties made a solemn contract agreeing to submit it to him, they are bound by his decision. From the time of the execution of the contract on the 19th of June, 1907, until the 6th of November, 1907, the Wellsville Oil company concurred in the theory that they had a good contract and that the Secretary of the Interior had the right to approve or disapprove the lease. They made the contract giving him this right, and not only giving him the right to approve the lease, but went further and provided that if he should approve it and the Wellsville company should not live up to its obligation, that the Secretary of the Interior should have the right to cancel it, and that the said contract "shall cease and end without resort to the courts and without further proceedings, and the lessor shall be entitled to immediate possession of the leased land and the permanent improvements located thereon."

The Secretary of the Interior disapproved the lease on November 6, 1907, for what reason the record is silent, but on account of him being one of the departmental officials of the Government, the court cannot inquire into the mental processes by which he reached his decision.

Does it appeal to the conscience of the chancellor to allow two parties to make a solemn contract between themselves to do a particular thing and make a provision that the contract shall be appro ed by a third party, and when this third party fails to approve the contract, and in fact disapproves it, then to allow one of the parties to come into a court of equity and ask relief, because the party disapproving it was not legally authorized; that is, ask the court to make a new contract for him? Courts of equity are not for the purpose of making contracts between parties, and I do not believe that this court will hesitate to say that the conduct of the plaintiff in this case was not only inequitable, but iniquitous, and that he did not come into court with clean hands. The plaintiff charged in his petition "that at the time of the executon of the lease set out in Exhibit 'C', the United States court for the Northern District of Indian Territory was acquiescing in admitting the power and authority claimed by the Secretary of the Interior in violation of the law, and were making all orders and decrees with respect to leases of minor full-blood Cherokee allottees subject to the approval of the Secretary of the Interior, and that each order and decree, insofar as they attempted to confer any jurisdiction upon the Secretary of the Interior to approve or disapprove such order or decree of the United States court, on leases granted thereunder, were in contraven-

tion of the law, and to such extent inoperative and mere surplusage, and did not in any way effect the rights of the parties to such contracts of lease, or to the contracts themselves."

In other words, the plaintiff contends that it knew at the time that it made the lease contract, Exhibit 'C', it was doing a wrongful act by taking a contract requiring the approval of the Secretary of the Interior, which it knew as a matter of law the Secretary of the Interior had no right to approve:

> "The principle of the maxim is that courts of equity will leave the guilty party seeking its aid where it found him. Not only does it refuse, as has been seen, to carry to fruition a fraudulent, illegal, or otherwise unconscionable transaction, but where such transaction has been in whole or in part carried out, refuses to undo it on application of the guilty participant, and refuses to relieve him of illegal liability or from the consequences of his misconduct." 16. Cyc. 145.
>
> *Richardson* v. *Walton*, 49 Fed. 888.
> *Creath* v. *Simms*, 5 How. 193, 12 L. Ed. 110.

Now, if it was illegal for the Secretary of the Interior to approve or disapprove the contract in controversy (and plaintiff is bound by the allegations of his pleading), still it was a party to the unlawful transaction, and is now estopped from going into a court of equity, asking relief

against such transaction. I contend that when the parties to the contract agreed that the Secretary of the Interior should have the right to approve or disapprove the said lease, (that even though the Secretary of the Interior, as a matter of law, did not have any legal authority), that his findings in that regard would be treated the same as though he did have authority, because the parties had placed it before him by agreement, and that the action of the Secretary of the Interior in disapproving the plaintiff's lease involved the exercise of his official discretion in the discharge of administrative powers, and his judgment and decision, induced by whatever reason, is not reviewable by the court. In the case of *Louisiana* v. *McAdoo*, 234 U. S. 633, 58 L. Ed. 1509, Justice LURTON, in speaking for the court, discussing the power of the judiciary to review the action of the executive officers empowered to exercise judgment and discretion in the discharge of official duties, said:

> "There is a class of cases hold that if a public official be required by law to do a particular thing, not involving the exercise of their judgment and discretion, he may be required to do that thing upon the application of one having a distinct legal interest in the doing of the act. Such an act would be ministerial only. But if the matter in respect to which the action of this official is sought is one in which the exercise of either judgment or discretion is required, the courts will refuse to substitute their judgment or discretion for that

of the official entrusted by law with its execution. Interference in such a case would be interference with the ordinary functions of the Government."

The Federal Government is the guardian of the full-blood Indian. This was decided by this court in the case of *Tiger* v. *Western Investment Company*, 221 U. S. 286,——L. Ed.——. The administration of Indian affairs has been largely delegated by Congress to the executive department. In the exercise of their executive duties, the Cabinet officials act for and represent the President as the supreme head of the executive department. It has not been the policy of American courts to control by mandamus, review, reverse or modify, through proceedings in equity, the executive acts of the executive officials of the Federal Government. Such review by the courts would result in making the courts supreme executive tribunals of the nation and destroy the independence of one of the co-ordinate branches of our Government. What I have heretofore stated has been on the theory that the Secretary of the Interior did not, as a matter of law, have any right to approve or disapprove the lease in controversy, and this assumption was based upon the allegations of the petition.

Now, if the lease was to cover the allotment of Martha Miller, after she became of age, then there would be no question but that the Secretary of the Interior should approve the same,

otherwise the contract would be absolutely null and void on its face, because Section 72 of the Cherokee Treaty, 32 Stat. L. 716, provides:

> "* * * leases for any period longer than one year for grazing, and for a longer period than five years for agricultural purposes and for mineral purposes, may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible to ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its validity. * * * *"

The Act of April 26, 1906, 34 Stat. L. 137, in Section 20, provides that:

> "That after the approval of this Act all leases * * * for land other than homesteads of full-blood allottees, of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Indians shall be in writing and subject to the approval of the Secretary of the Interior, and shall be absolutely void and of no effect whatever without such approval."

Now, assuming that this lease was to run for a period of time commencing with the majority of Martha Miller, there would be no doubt about the jurisdiction of the Secretary of the Interior over the said lease being absolute and complete, and that when he exercised his right to disapprove, as is evidenced on the lease set out as Exhibit "C" to the amended petition, the Secretary of the In-

terior exercised a function committed to him as an administrative official of the Government and having exercised such function it does not lie within the power of the court to change, alter or revise that decision.

PLAINTIFF'S FIRST PROPOSITION.

"Plaintiff asserts title to an oil and gas lease made in pursuance to the judgment of the United States court. The Supreme Court denied the title of plaintiff in error so asserted, and therefore refused to give legal effect and full faith and credit to the judgment relied upon by the plaintiff in error."

Counsel in his brief says that the plaintiff claimed title to an oil and gas lease under date of June 19, 1907, and believed that the lease was authorized by a decree of the United States court for the Northern District of the Indion Territory, sitting in equity. He also sets out a portion of the copies of the orders authorizing and confirming the lease. He alleges that the lessor was receiving the stipulated royalty and the lessee had in all respects complied with the terms and conditions of the lease. The defendant denies that the allottee was receiving the stipulated royalty from the plaintiff in this action, and denies that the records show that they were receiving the same. On this feature of the case counsel seems to place a great deal of stress upon the opinion of the court in the case of *Cowles*

v. *Lee*, 35 Okla. 159, 128 Pac. 688. *Morrison* v. *Burnett*, 154 Fed. 617. *Laurel Oil Co.* v. *Morrison*, 212 U. S. 291, 53 L. Ed. 517, and *Files* v. *Brown*, 124 Fed. 133. Counsel contends that this authority sustains him on the validity of the judgment approving and confirming the lease. In all of these cases there was no question of *restrictions* involved, but they were free from any *Indian restrictions*, and being free from Indian restrictions they could not be decisive of the case at bar.

Counsel seems to be of the opinion that the Morrison case is conclusive on the question of the United States court for the Northern District of the Indian Territory possessing jurisdiction to authorize the lease asserted in this case, independent of the approval of the Secretary of the Interior. We respectfully beg to differ with the gentleman on the other side. First, because of the fact, that in the Morrison case the lands were unrestricted, and second, to use the language of Circuit Judge SANBORN, who wrote the opinion:

> "The real question in the case is: may a court of equity during the term at which the confirmation is made, legally avoid an executed judicial sale which it has confirmed on the sole ground that a larger price may be obtained by a second sale."

The Morrison case was for a lease only during the minority of the minor, and of course with the lands *unrestricted*, and to run only during the min-

ority of the minor, the Probate Court was the only tribunal whose authority was necessary, under the general law, or special acts of Congress with reference to the approval of oil and gas leases. In the case at bar the facts are entirely different. The lease here is one which the court attempted to make on the land of an *adult*, or rather the lease was to become operative only from the time the allottee became an adult, and of course the Probate Court, or the court of equity neither one had any authority over the *adult* lands *unless there was some litigation pending before it or special act of Congress authorizing it.*

It is further contended that a lease by a guardian under order of the United States court for the Northern District of Indian Territory was valid even though extending beyond the minority of the minor, and counsel then cites several cases along that line. These were all cases in which *restrictions* were not involved, and it is quite probable that under ordinary cases where there is no restriction involved, that the law as announced in these cases is correct; but I do not believe that any of the cases would apply here because under the holding of the courts, which are plain constructions of the Acts of Congress as I see them, after the Act of April 26, 1906, and prior to the Act of May 27, 1908, all oil and gas mining leases of *minors* and *incompetents* were subject only to the approval of the United States court, while all adult leases dur-

ing the same time, the only approval necessary was that of the Secretary of the Interior, and unless the United States court and the Secretary of the Interior both concurred in the approval of a lease, one could not be made that would be valid for a longer period than the minority of the minor, if a full-blood Indian. After the minor became of age, then the only provision preventing him from leasing his land is the fact that it must be approved by the Secretary of the Interior, and he has the right to approve or disapprove as he sees fit, he being an administrative official of the Federal Government. It is claimed by counsel that inasmuch as the only title asserted by it was its title based on the judgment already referred to, which was specifically plead, and in view of the fact that the Supreme Court of Oklahoma denied the validity of plaintiff's lease, it would show, according to his contention, that the judgment of the United States court was not accorded the effect to which it was entitled under the Federal law. I do not think that because of the mere fact that counsel pleaded the judgment's approving, or attempting to approve the lease, that that would make the lease depend entirely for its validity upon the judgment: in other words, suppose for the sake of argument, that an adult whose land was not restricted had made an oil and gas mining lease and had then had the court to approve it also, although he did not have any title to the land on which he

was making the lease; the question comes up to trial of title between the two lessees, and he pleads that because of the fact that he has had his lease approved by the court that we cannot make collateral attack on the judgment, and therefore, his entire title to the lease is deraigned through the judgment of the court; it is easy to see in such a case that his title is not deraigned through the *judgment* of the court or the *approval* of the court, and that the judgment was simply surplusage, and his real title is derived through the instrumentality of the lease and some other source, if any he has. In this case let us assume for the sake of argument, that there were no restrictions upon the lands of Martha Miller, and that she executed the lease in controversy, and also had the same executed by her guardian and approved by the court, as was done. Under the general rule of law, a contract made by a minor, regarding his real property, after he is over a certain age, is such a contract that he can ratify or disaffirm when he becomes of age. In the event he does not disaffirm it when he becomes of age, then of course it would be a valid contract and the court's approval and entering of judgment would in a case of that kind not give any validity to the title. That is the question that we have here before us, in a way, because the lease was made by both the guardian and Martha Miller, the minor, which provides in itself that it was to be approved by the Secretary of the Interior, and had

the restrictions been removed by the Act of Congress between the time of making of said lease and the time when she became of age, and after becoming of age she had failed to disaffirm the contract, then the lease might have been good without the approval of the court. At all events, the court's approv l would not have added anything to the value and muniments of title. I use this illustration for the purpose of showing to the court that the court below might have found that the title of the plaintiff was not based upon the judgment of the United States court, and if it was not based upon that judgment, it would not be a failure to give full faith and credit to said judgment:

Upon the third point urged by counsel for the plaintiff:

> **"C. The petition for the plaintiff in error shows that at all times between the date of the lease and the bringing of this suit the lessor was accepting royalties due under this lease, and is therefore now estopped to assert that the lease is objectionable because the same was not approved by the Secretary of the Interior."**

This is simply an attempt on the part of counsel to plead estoppel, and while he knows as a matter of fact, from the record, that the plaintiff did not pay to the defendant Martha Miller the royalties in the case, he attempts to allege it as a fact by indirect allegations in his brief, as follows:

> "It was further alleged that plaintiff in all respects complied with the terms and conditions and stipulations of said lease. This allegation carries with it the further allegation that the royalties provided for in the lease were paid to the lessor, as that was one of the terms of the lease."

Counsel attempts to dodge the main issue under this estoppel question by saying:

"Eliminating for the time being any Indian question"—but he never gets back in his brief to argue the question of estoppel as applied to a full-blood Indian. Counsel cites in its brief the case of *Shrimpscher* v. *Stockton*, 183 U. S. 290, 46 L. Ed. 203, and says that the court held that while the statutes did not run during the period of positive restriction, that it did commence to run upon a qualified removal of restrictions. In the case at bar there has been no removal, either qualified or otherwise, of restrictions, and Martha Miller, being a full-blood Cherokee Indian, and having her allotment restricted, the rule of estoppel will not apply to her. Section 72 in the Cherokee Treaty reads in part as follows:

> "Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible to ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

This section was still in force at the time of the

making of the lease in controversy, and therefore the rule of estoppel could not be invoked against the defendant.

PROPOSITION THREE.

"The Supreme Court of Oklahoma, denied the legal effect of the judgment pleaded by the plaintiff in error, permitting the judgment to be collaterally attacked, which is error."

Counsel in his brief shows that the defendant in error had the right of appeal to the Circuit Court of Appeals, from the judgment of the United States Court in the Indian Territory, confirming the lease relied upon by the plaintiff in error. I do not agree with counsel on that proposition, and I will give the court my reason for doing so: When the lease was authorzed and confirmed by the United States Court for the Northern District of the Indian Territory, the one appearing before the court was Martha Miller, by and through her guardian in *ex parte* proceedings, in which she, herself, invoked the jurisdiction of the court. The Alpha Oil Company was not a party to the proceeding, and did not get its title to the oil and gas mining lease for a period of time, at least six months thereafter, and presumably knew nothing whatever of this proceeding in the United States Court. Therefore, Martha Miller could not appeal from the judgment which she herself obtained. The Alpha Oil Company had no interest in the suit at

that time and there was no competent party to perfect the appeal.

Counsel further says that he set up this judgment in its petition and that the judgment is the basis of its title. I disagree with him, because the lease which he has is the basis of title and not the judgment. The judgment is purely ancillary to the lease. Counsel further contends that under *Cowles* v. *Lee*, decision by the Supreme Court of Oklahoma, that this decision of the District Court of Rogers County, was a collateral attack on the judgment of the United States Court for the Northern District of the Indian Territory. The Supreme Court of Oklahoma in a very recent case, that of *Roth, et al.*, v. *Union National Bank of Bartlesville*, 160 Pac. 505, discusses all of the decisions of the Oklahoma and United States Supreme Courts on this subject, and finally winds up by holding that if the court could not acquire any jurisdiction by virtue of the facts in the case, that therefore, it would be beyond the power of the court to entertain jurisdiction, and any order it might make would be void and subject to collateral attack. The court seems to draw the distinction between void and voidable judgments on collateral attack, and holds that where the record shows upon its face facts which do not show jurisdiction in the that its jurisdiction can be attacked at any time and in any manner.

Second Appeal.

As has heretofore been said in this brief, it refers almost exclusively to the opinion rendered by the State Supreme Court on the merits of the first case, and does not touch upon the questions raised by the plaintiff under the appeal from the last decision of the State Supreme Court, which is set out in full at pages 101 and 102 of the printed transcript. The last opinion and judgment of the State Supreme Court was one dismissing the appeal from the order of distribution of the funds in the hands of the court at Claremore, the appellate court having decided that the Wellsville Oil Company did not have any interest in said lease or the funds arising therefrom. The only question that was determined by the court was the distribution of the money as between the defendants here, Martha Miller and the Alpha Oil Company. The plaintiff saw fit to appeal from this judgment and on that appeal the State Supreme Court entered an order of dismissal on the theory that the appeal was so manifestly without merit that it was not necessary for it to hear the same at length, although as stated by the court in its opinion, the case was elaborately briefed and argued orally to the court. The dismissal of that appeal was purely a matter of state practice and cannot be said in any wise to contain a Federal question, or to in any way involve the merits of the case. In other words, it was not an appealable order. To use the

language of the Court Commissioner in rendering the opinion, "The plaintiff has had his day in court in which it was awarded unusual consideration; two oral arguments, and it should abide the judgment rendered without complaint, especially in view of the fact that the case was tried alone on the uncontradicted evidence of the plaintiff. In short, this second appeal is wholly dilatory and entirely without merit." Printed Record, page 123.

With further reference to the claim of the plaintiff that he should have been allowed for the improvements placed upon the premises. I call attention to that part of the lease contract under which the plaintiff was operating, the same being the lease executed April 5, 1905, to S . R. Bartlett and E. H. Smith, and by them assigned to the plaintiff (page 19, printed transcript), as follows:

> "* * * and not to move therefrom any buildings or improvements erected thereon during said term by the said party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of said land as a part of the consideration for this lease, in addition to the other considerations herein provided, except tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, machinery and casing of all dry or exhausted wells, shall remain the property of the party of the second part and may be removed at any time before the expiration of sixty days from the termination of this lease."

I contend that in the first place that a court of equity would not have the power to settle the question of his allowance for improvements, operation of the plant, etc., and especially was that true in the case in controversy, because of the fact that the demurrer was sustained to the amended petition and thereby that case was closed. The court not having jurisdiction, it would have been improper to have entered judgment in that case unless the suit had gone to final hearing and the court had then held that the plaintiff was entitled to recover, but the same having been disposed of on demurrer, the plaintiff had no standing in court for a decree for reimbursement for all necessary and proper expenses incurred by it in the production of oil from said land. Aside from that legal proposition the contract under which they were operating and to which I have just referred, allowed them a certain time to take off all the property in the way of tools and machinery to which they were entitled.

RESUME.

In conclusion, I might say that the defendant contends that this court is without jurisdiction to hear and determine the questions involved herein, first, because the records are improperly before this court, and second, there is no Federal question involved.

If the court finds that it has jurisdiction, then we contend that the opinion of the State Supreme Court should be affirmed for the reasons:

First: That the amended petition of the plaintiff did not contain any equity, and this feature of the case may be said to contain the following subquestions, to-wit:

(1) The United States Court for the Northern District of the Indian Territory was without jurisdiction to make and enter an order in equity, authorizing the guardian to execute and deliver a valid oil and gas mining lease upon the allotment of Martha Miller, a full-blood Cherokee Indian, for any period of time after the said Martha Miller had reached her majority, unless said lease was duly approved by the Honorable Secretary of the Interior.

(2) Because the plaintiff breached its contract with Martha Miller, under which it was operating the property in controversy at the time it attempted to take its second lease in this:

(a) By its unlawful and excessive pumping of the wells it committed waste upon said land.

(b) Its failure to deliver possession to the defendant, Martha Miller, at the expiration of its lease on March 17, 1908, the time when she became of age.

(c) Failure and refusal to comply with the rules and regulations of the Honorable Secretary of the

Interior in operating said property.

(3) That under the contract as it existed, the plaintiff having agreed that the contract should be approved by the Secretary of the Interior, and should not be binding and of no effect without his approval, and the Secretary of the Interior having failed to approve it, the plaintiff had no standing in a court of equity for the enforcement of the contract, or the making of a contract different from the one it had already made.

I therefore respectfully say that under the questions above outlined, that the decision of the State Supreme Court even should this court hear it on the merits, should be affirmed and even though the court finds that there is a Federal question involved, but that the State Supreme Court correctly decided the other question, we then submit that the case should be affirmed, for which we respectfully ask.

Respectfully submitted,

ROBT. J. BOONE,
Attorney for Defendants in Error,
Tulsa, Okla.

No. 541.

In the

Supreme Court of the United States.

October Term, 1916.

WELLSVILLE OIL COMPANY, *Plaintiff in Error,*

VERSUS

MARTHA MILLER, *nee* EVERETT, and ALPHA OIL COMPANY, - - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PLAINTIFF IN ERROR ON MOTION OF DEFENDANTS IN ERROR TO DISMISS OR AFFIRM.

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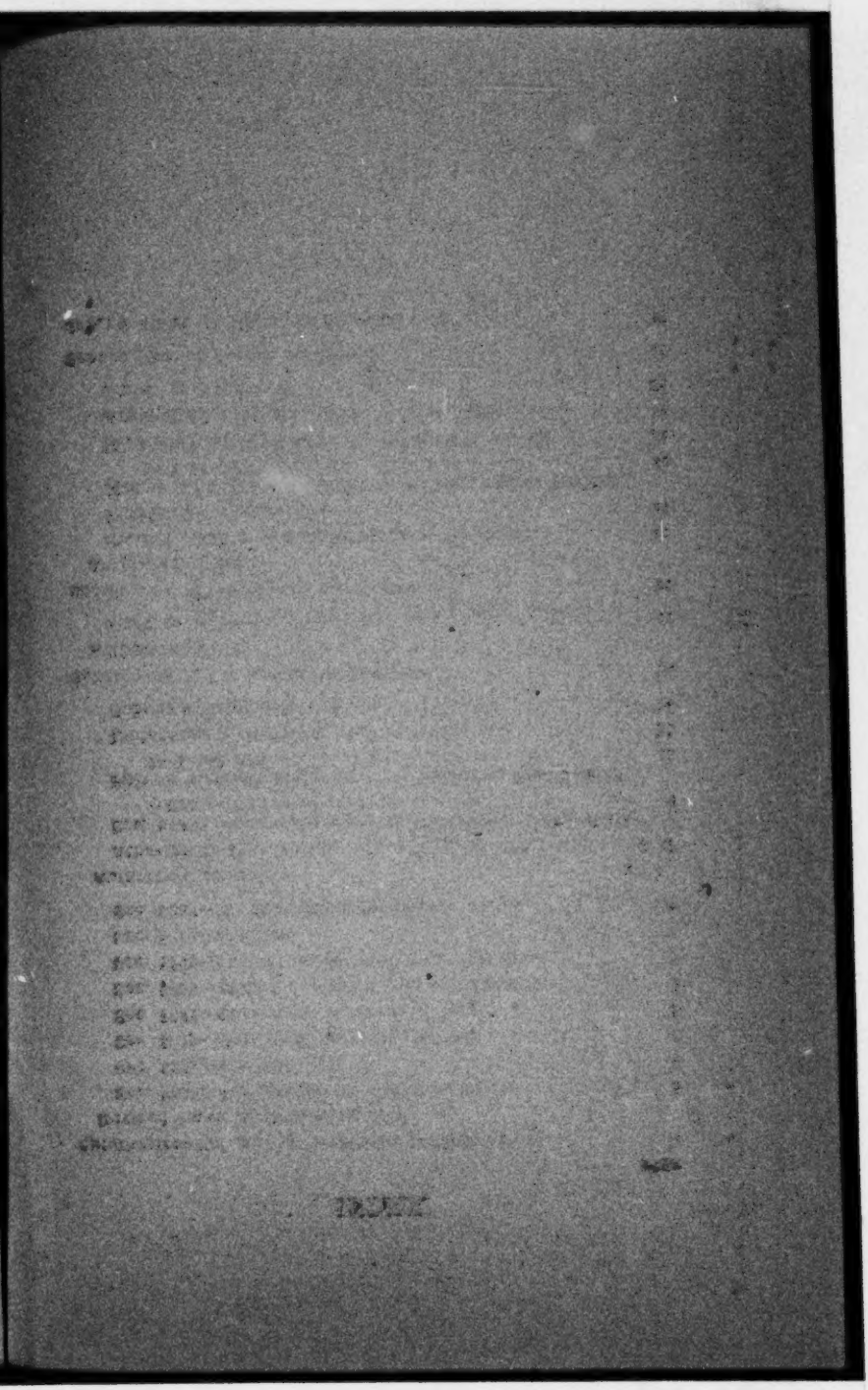

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REPLY BRIEF OF PLAINTIFF IN ERROR ON MOTION OF DEFENDANTS IN ERROR TO DISMISS OR AFFIRM.

For the purposes of this brief, the plaintiff in error will content itself in answering or replying to the propositions or grounds presented by the motion of the defendants in error to dismiss or affirm, in the same order in which they are presented by the brief of the defendants in error filed in support of such motion.

Sub-divisions "*a*" and "*b*" of the first paragraph of the motion to dismiss, while presented as grounds or reasons why this court does not have jurisdiction to review on writ of error the judgment complained of in this cause, do not, as the motion itself discloses, go to the jurisdiction of this court, but merely set up the fact that the Supreme Court of Oklahoma was without jurisdiction to grant the writ of error or to transmit or cause to be transmitted the record in this cause, for the reason that it had lost jurisdiction of the parties and the subject matter when the mandate of the said Supreme Court of the State of Oklahoma was issued to the District Court of Rogers County, Oklahoma. The pleader evidently erroneously treating or attempting to show that a writ of error operates upon the parties and subject matter of the litigation.

These sub-divisions "*a*" and "*b*" of the first paragraph of the motion to dismiss or affirm are, by the defendants in error, grouped and presented together, and inasmuch as both of such sub-divisions involve the identical proposition, in reply thereto, we shall treat them in like manner.

Realizing, as we do, that this court will take judicial notice of the laws of this and other states, and while, no doubt, this court is familiar with the appellate procedure in vogue in this state, yet for the pur-

pose of exhibiting unto this court the efforts of the defendants in error to have this cause disposed of, without the plaintiff in error having a fair opportunity to make full presentation to this Honorable Court of the matters involved, and for the purpose of compiling, in convenient form, the only laws of the State of Oklahoma relating to the method of perfecting an appeal in cases of this nature, we quote from such laws as follows:

Section 5236 of the Revised Laws of Oklahoma, 1910, as to the jurisdiction of the Supreme Court, is as follows:

"5236. *Jurisdiction of Supreme Court.* The Supreme Court may reverse, vacate or modify judgments of the County, Superior or District Court, for errors appearing on the record, and in the reversal of such judgment or order, may reverse, vacate or modify any intermediate order involving the merits of the action, or any portion thereof. The Supreme Court may also reverse, vacate or modify any of the following orders of the County, Superior or District Court, or a judge thereof:

"*First.* A final order.

"*Second.* An order that grants or refuses a continuance; discharges, vacates or modifies a provisional remedy; or grants, refuses, vacates or modifies an injunction; that grants or refuses a new trial; or confirms or refuses to

confirm, the report of a referee; or sustains or overrules a demurrer.

" *Third.* An order that involves the merits of an action, or some part thereof."

Section 5238 of the Revised Laws of Oklahoma, 1910, provides the method of appealing a cause in order to obtain a review, reversal or modification of the judgment of the lower court, and is as follows:

" 5238. *Petition in Error.* The proceedings to obtain such reversal, vacation or modification, shall be by petition in error, filed in the Supreme Court setting forth the errors complained of; and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record, in the original case, shall be sufficient. The summons shall notify the adverse party that a petition in error has been filed in a certain case, naming it, and shall be made returnable on or before the first day of the term of the court, if issued in vacation, ten days before the commencement of the term. If issued in term time, or within ten days of the first day of the term, it shall be returnable on a day therein named. If the last publication or service of the summons shall be made ten days before the end of the term, the case shall stand for hearing at that term."

Section 5240 of the Revised Laws of Oklahoma, 1910, provides for the production of the record in the Supreme Court, and is as follows:

> " 5240. *Case-made Attached—Costs.* In all actions hereafter instituted by petition in error in the Supreme or other appellate court the plaintiff in error shall attach to and file with the petition in error the original case-made, filed in the court below, or a certified transcript of the record of said court; and in no such action hereafter instituted in the Supreme Court shall any charge, fees or costs be taxed or allowed for making any copy of any case-made, or transcript, when such copy shall be ordered by the court for its use, and the same has not been furnished by the plaintiff in error thirty days before the first day of the term at which the case shall stand for hearing, and no costs or fees shall be taxed for making a complete record in such case, except when the same shall be made by request of a party to the suit and at his own costs."

Section 5241 of the Revised Laws of Oklahoma, 1910, provides what the case-made or record shall contain, and is as follows:

> " 5241. *Case-made to Contain What.* A party desiring to have any judgment or order of the County, Superior or District Court, or a judge thereof, reversed by the Supreme Court, may make a case, containing a statement of so much of the proceedings and evidence, or other mat-

ters in the action, as may be necessary to present the errors complained of to the Supreme Court."

Section 5258 of the Revised Laws of Oklahoma, 1910, provides for the issuance of the mandate by the appellate court, and is as follows:

"5258. *Mandate to Issue to Lower Court.* When a judgment or final order shall be reversed on appeal, either in whole or in part, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounce judgment as aforesaid, but shall send a special mandate to the court below as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the same manner as if such judgment or final order had been rendered therein. In cases decided by the Supreme Court, when the facts are agreed to by the parties, or found by the court below, or a referee, and when it does not appear, by exception or otherwise, that such findings are a g a i n s t the weight of the evidence in the case, the Supreme Court shall send a mandate to the court below, directing it to render such judgment in the premises as it should have rendered on the facts agreed to or found in the case."

Section 5259 of the Revised Laws of Oklahoma, 1910, provides for the filing of the opinion in the case, and makes same a part of the record, and is as follows:

"5259. *Opinion to Be Filed With the Case.* It shall be the duty of the justices of the Supreme Court to prepare, and file with the papers in each case, full notes of the opinion of the court upon the questions of law arising in the case, within sixty days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed."

Section 5260 of the Revised Laws of Oklahoma, 1910, providing for the sending of a syllabus of the points of law decided in the case by the Supreme Court, together with the mandate to the lower court, is as follows:

"5260. *Syllabus.* A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the justice delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the justices concurring therein, for revisal before filing thereof,

and it shall be filed with the papers, without alteration, unless by consent of the justices concurring therein; and a copy of such syllabus shall, in all cases, be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by section 5258."

Section 5263 of the Revised Laws of Oklahoma, 1910, abolishing writs of error, and other methods of appeal, is as follows:

"5263. *Writs of Error Abolished.* Writs of error and *certiorari*, to reverse, vacate or modify judgments or final orders, in civil cases, are abolished; but court shall have the same power to compel, complete and perfect transactions of the proceedings containing the judgment or final order sought to be reversed, to be furnished, as they heretofore had under writs of error and *certiorari*."

Therefore, we respectfully submit that at all times, after an appeal has been perfected from the lower to the Supreme Court of Oklahoma, the record or transcript is retained in the Supreme Court, and is the foundation of the proceedings there, and the practice in this state, as outlined by the provisions of the laws herein quoted, does not permit the transmission of the records from the Supreme Court to the inferior courts.

This court, in the case of *Atherton et al.* v. *Fowler et al.*, 23 L. ed. 265, states the rule as to which court the writ of error should be directed in order to procure the production of the record in the Supreme Court of the United States as follows:

> " The rule may, therefore, be stated to be, that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the state to an inferior court for safekeeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this, we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know the record is in the possession of the inferior court and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court being the custodian of its own records, is alone authorized to certify them to us."

So, too, the clerk of the Supreme Court of the State of Oklahoma, by statute, is alone authorized to certify or exemplify a record of the proceedings had and taken in the Supreme Court of this state.

Section 8090-o, Bunn's Supplement to the Revised Laws of Oklahoma, specifying the duties of the Clerk of the Supreme Court, is as follows:

"8090-o. *Duties of Clerk.* The clerk of the Supreme Court shall carefully keep a minute of the proceedings of the Supreme Court for each day, drawn up at large in a record book to be kept by him for that purpose; he shall seasonably record the judgments, decree, and orders, and properly bind the decisions of the court; he shall safely keep all records, files, books and papers committed to his charge, and also presses and furniture belonging to his office, and deliver such records, files, books, papers, presses and furniture to his successor in office; and in case of refusal or failure to deliver whatever belongs to his office to his successor, his bond may be put in suit by the attorney general; he shall prepare for any person, demanding the same, a certified copy of any paper, record, decree, judgment or entry on file in his office, proper to be certified, for the fees prescribed by law; and he shall perform such other services as may be prescribed by law; or are usually performed by persons in like positions and such duties as may be prescribed by the Supreme Court, not in conflict with this act. The transcript filed in the Supreme Court, the process in each case, and the judgment or the decree of the court thereon, shall be the final record in the cause, and certified as such by the clerk whenever an exemplification of the judgment or decree of the court may be required."

The case of *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81, 28 L. ed. 938, cited and relied upon by counsel for defendants in error as supporting their right to have the writ of error in this cause dismissed, because of the fact that such writ of error was directed to the Supreme Court of Oklahoma, and not to the inferior court, namely: the District Court of Rogers County, Oklahoma, is not in point, because in that case it is specifically stated that the record does not, nor does a copy thereof, remain in the Supreme Court, but is by the Supreme Court remitted to the inferior court, and can be found nowhere else but in the Circuit Court of La Crosse County, the court saying:

> " It appears, by the cases cited to us and by the course of proceedings in such cases in the Wisconsin court, that the record itself is remitted to the inferior court and does not nor does a copy of it remain in the Supreme Court. Though the judgment in the Circuit Court was the judgment which the Supreme Court ordered it to enter, and was in effect the judgment of the Supreme Court, it is the only final judgment in the case, and the record of it can be found nowhere else but in the Circuit Court of La Crosse County."

That such a course of procedure as is contended for by defendants in error would have been errone-

ous is shown by the case of *Underwood* v. *McVeigh*, 21 L. ed. 952, the syllabus of which is as follows:

> " Where a judgment of an inferior state court was affirmed in the Court of Appeals of the state, and upon such affirmance judgment was given in the latter court that the defendant in error recover of the plaintiffs in error his damages and costs, and such judgment was entered in the former court, the writ of error from this court must be directed to such Court of Appeals, and not to the inferior state court, and if directed to the inferior state court the writ of error will be dismissed."

Therefore, we respectfully submit, the Supreme Court of Oklahoma, being the custodian of its own records, the clerk of such court being by law designated as the only one authorized by law to certify to and exemplify such record, was the only court to which this court could properly have directed its writ in order to procure such record, and that to have directed the writ to the District Court of Rogers County, Oklahoma, would have been but idle ceremony, as that tribunal could have, and probably would have, truthfully answered such writ by saying that the record of the case as decided by the Supreme Court of Oklahoma was not lodged with it.

We desire to quote further from *Atherton* v. *Fowler, supra,* wherein it is said:

> " In this case, our writ went to the Supreme Court; and, in obedience to its command, that court has sent us its record. There is now no need of a further writ, even if the practice in California permitted the transmission of records from the Supreme Court to the inferior courts. But such, as we understand, is not the practice. The Supreme Court is there the sole custodian of its own records. Cases go there upon a transcript of the proceedings in the court below. This transcript is retained in the Supreme Court, and is the foundation of the proceedings there. The transcript is, without doubt, a copy of the proceedings in the court below; but that does not make the record below the record above. The court above acts only upon the transcript, and from that and proceedings thereon its record is made. * * *
>
> " The motion to dismiss is denied."

It may be, and probably is the case, that counsel for the defendants in error are laboring under a misconception or misunderstanding of the law, they probably believing, as their brief would seem to indicate, that the offices or objects of a writ of error is to operate upon the parties. That such is not the law, is shown by the holding of this court in the case of *Cohens* v. *Virginia,* 5 L. ed. 262, which says:

> " Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal."

The only appellate procedure in existence in this state being such as is provided by statute, we respectfully submit that sub-divisions "*a*" and "*b*" of the first ground of the motion of the defendants in error to dismiss or affirm not only state erroneous propositions of law so far as the jurisdiction of this court is concerned, but are so devoid of merit that they are not worthy of consideration, except for the purpose of exhibiting to this court the efforts of the defendants in error in their attempt to prevent the plaintiff in error from making a full presentation to this court of the matters and things involved herein of which it complains.

Sub-division "*c*" of the motion of the defendants in error to dismiss or affirm, is as follows:

> " *(c)* That the Supreme Court of Oklahoma was without jurisdiction to grant an order of supersedeas or to attempt to approve a supersedeas bond at any time after the expiration of

sixty days, Sundays excluded, from the rendition of the judgments complained of."

This is also presented by the defendants in error as a ground or reason why this court does not have jurisdiction to review on writ of error the judgments complained of in this cause, and, like the preceding grounds of such motion, is equally devoid of merit.

We respectfully submit that the erroneous granting of a supersedeas is not a jurisdictional defect; nor can the same be made the basis of a motion to dismiss.

In the case of *Hudgins* v. *Kemp*, 18 How. 530 (U. S.), 15 L. ed. 511, this court held:

> " In this case, certainly the appeal did not operate as a supersedeas. The security was given and approved long after the time limited by the Act of Congress. Nor was a n y supersedeas moved for or awarded by the Circuit Court or the judge of the Supreme Court, who approved the bonds. Nor could any have been awarded by any court or judge. And, upon the expiration of ten days, the plaintiff had a right to proceed on his decree and carry it into execution, notwithstanding the pendency of the a p p e a l in this court."
>
> " But if a supersedeas had been awarded, this motion could not be maintained. The motion

should have been to discharge the order, not to dismiss the appeal. And the propriety or impropriety of an order granting a supersedeas could not be considered on a motion to dismiss. The order for the supersedeas might be discharged, and the appeal still maintained."

Therefore, sub-division "*c*" of the first ground of the motion to dismiss or affirm, even if the defect complained of exists, not presenting a question which could defeat the jurisdiction of this court, cannot prevail.

Sub-division "*d*" of the first ground of the motion of the defendants in error to dismiss or affirm, is as follows:

"*(d)* That there is no federal question involved."

While this presents a proper ground to test the jurisdiction of this court to review on writ of error the judgment of the Supreme Court of Oklahoma, still, this ground of the motion, like the preceding grounds, is devoid of merit.

This appeal to this Honorable Court is based upon section 709 of the Revised Statutes of the United States, and, of course, it is therefore necessary to the jurisdiction of this court that there exist one or more federal questions.

The broad assertion of counsel for defendants in error that he is unable to find the existence of a federal question in the record, we submit, should not be taken seriously, but, be that as it may, the record in the case has been printed, and is a part of the records of this court, and the court shall judge for itself as to whether or not there exists a federal question or facts sufficient to give unto it jurisdiction; we shall not delve into this matter at length, realizing that to do so would be, more or less, going into the merits of the litigation at bar.

For the convenience of the court, however, we will, in a brief, concise manner, refer to some of the federal questions which are patent upon the face of the record.

The amended petition of the plaintiff in error, which is found on pages 11, 12, 13, 14, 15, 16, 17 and 18 of the printed record, together with the exhibits found at pages 18 to 28, both inclusive, of the printed record, shows the existence of certain judgments of the United States Court for the Northern District of the Indian Territory, made in a cause wherein the parties hereto were the parties before the court, and wherein the subject matter involved in this litigation, was the subject matter under consideration before the court rendering such judgments, and on page 43, *et seq.*, of the printed record, it is shown that the

District Court of Rogers County, Oklahoma, failed and refused to give unto the judgment of the United States Court for the Northern District of the Indian Territory full faith and credit, and that the Supreme Court of Oklahoma acquiesced in and affirmed the action of the District Court of Rogers County, Oklahoma, and thereby the Supreme Court of Oklahoma failed and refused to give unto the judgment of the United States Court for the Northern District of the Indian Territory full faith and credit.

On page 44 of the printed transcript, the opinion as rendered by the Supreme Court of Oklahoma, clearly shows that such court had under consideration the validity of the authority exercised by the United States Court for the Northern District of the Indian Territory over the allotted lands of certain Indians, and that by the decision now brought before this court for review, the said Supreme Court of Oklahoma decided against the validity of such authority as was exercised by the United States Court for the Northern District of Indian Territory over such lands.

On page 44, *et seq.*, of the printed transcript, the opinion, as rendered by the Supreme Court of Oklahoma, clearly shows that such court had under consideration certain Acts of Congress, wherein the authority of the United States Court for the Northern District of the Indian Territory to authorize and ap-

prove leases of Indian lands in the Indian Territory, as provided in the Statutes of the United States, was drawn into controversy, and that by the decision now brought before this court for review, the said Supreme Court of Oklahoma, in effect, i. not in words, decided against the validity of such authority, and held such statutes to be invalid.

Also, the record clearly shows the existence of a right and title claimed under an authority exercised under the United States, and asserted by the plaintiff in error, and the denial of such right and title by the Supreme Court of the State of Oklahoma, by refusing to give effect to the decision or judgment of the United States Court for the Northern District of the Indian Territory, or the authority exercised by such United States Court.

Pages 57 to 88, both inclusive, show that plaintiff in error was deprived of its property without due process of law, in that the District Court of Rogers County, Oklahoma, ordered the custodian of certain funds, of which the plaintiff in error was the owner, to be paid to the defendants in error, although the defendants in error had at no time, by any pleading in said court, set up or asserted any title whatsoever to said funds, and that by the decision now brought before this court for review, the Supreme Court of Oklahoma acquiesced in and affirmed the action of

the District Court of Rogers County, Oklahoma, and thereby the plaintiff in error became and was deprived of its property without due process of law.

That the printed record shows that by said decisions of the Supreme Court of the State of Oklahoma, said court determined that the judgment of said United States Court for the Northern District of the Indian Territory, was dependent for its efficacy in making said lease, upon an approval of said lease by the Secretary of the Interior, and that under the Acts of Congress in reference to the leasing of Indian lands in the Indian Territory, the Secretary of the Interior was not required to, and had at said time no authority to approve said lease made under the order of the court, as aforesaid, and that power was conferred upon the United States Court for the Northern District of the Indian Territory to authorize and approve said leases and make same effective, without the consent or approval of the Secretary of the Interior, and that said decisions of the Supreme Court of Oklahoma are adverse to the right of the plaintiff in error, and that said rights are based upon statutes of the United States authorizing the making of oil and gas mining leases on certain Indian lands, in the manner in which the lease in controversy was made.

That in addition to the numerous federal questions hereinbefore enumerated, we respectfully submit that the record, as a whole, shows the existence

of many more, of equal or greater import, the existence of any one of which is sufficient to give unto this court jurisdiction, and such being the case this court will retain the cause and render therein such judgment as should be rendered.

In the case of *Stanley et al.* v. *Schwalby et al.*, 40 L. ed. 960, this court says:

> " But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and, as his justification depends upon the question whether the title to the property was in the defendant in attachment, or in the plaintiff in the action of trespass, this court, upon the writ of error, has the power to decide that question, even if it depends upon local law or upon general principles."

In the case of *Pickering* v. *Lomax*, 36 L. ed. 716, wherein the identical question involved in the case at bar was before this court, with the exception that it was the President who approved the deed, instead of the United States District Judge, as in the present case, the court said:

> " A preliminary question is made by the defendant in error, as to the jurisdiction of this court. By Rev. Stat. 709, our authority to review final judgments or decrees of the highest courts of a state extends to all cases 'where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity.' The argument of the defendant in this connection is that as the title to the lands did not pass by treaty, which contained only an agreement to convey, the proviso ceased to be operative when the patent was issued in 1843; that the same restriction upon alienation contained in the patent was one which the Supreme Court of Illinois had considered; and that their construction, that no title passed from Robinson and Horton for want of permission of the President of the United States, could not be reviewed by this court. There are two sufficient answers to this contention: *First*, the proviso in the treaty did not continue by its express terms to be operative, so long as the land was owned by the grantees or their heirs, and the object of carrying this proviso into the patent was merely to apprise intending purchasers of the restrictions imposed by the treaty

upon the alienation of the lands. *Second, the case raised the question of the validity of an authority exercised under the United States, viz., the authority of the President to approve the deed thirteen years after the execution, and the decision of the Supreme Court of Illinois was against its validity; so that the case is directly within the words of the statute.*" (The italics are our own.)

In the case of *Mutual Life Insurance Company of New York* v. *Alphonsine McGrew*, 47 L. ed. 480, on page 486, it is said:

> " Where a state court refuses to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and the parties, it denies the validity of an authority exercised under the United States; and where a state court refuses to give effect to the judgment of a court of another state, it refuses to give full faith and credit to that judgment. The one case falls within the first class of cases named in Sec. 709 (U. S. Comp. Stat. 1901, p. 575), and the other within the third class."

In the case of *Hancock National Bank* v. *Farnum*, 44 L. ed. 619, it is held:

> " A judgment of a Circuit Court of the United States must be given the same effect in other states that it is entitled to in the state in which

it is rendered, and that is the same as if it were a judgment of a state tribunal of equal authority."

Also in the same case, in speaking on the question of the jurisdiction of the Supreme Court of the United States, Justice BREWER says:

> "The plaintiff's contention that these federal provisions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear."

To fully demonstrate to the court the entire lack of merit of the motion of the defendants in error, we respectfully direct the court's attention to the case of *Avery et al.* v. *Popper et al.*, 45 L. ed. 203, wherein a collection of a great number of cases involving this question is made, and each case discussed, and the rule is laid down as follows:

> "With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in federal courts and parties making adverse claims to the property sold, the true rule to be deduced from these authorities is this: that the writ will lie, if the validity or construction of the judgment of the federal court, or the regularity of the proceedings under the execution, are assailed."

In conclusion, upon this ground of the motion, we desire to direct the court's attention to the case of *Embry* v. *Palmer*, 27 L. ed. 346, wherein, on page 348, it is said:

> " The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As a part of its general authority, the power to give effect to the judgment of its courts is co-extensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right which the Constitution has given to Congress of exclusive legislation over the district. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligations created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced."

Therefore, it necessarily follows, and we respectfully submit, that insofar as sub-division "*d*" of the

first ground of the motion of the defendants in error to dismiss or affirm is concerned, the same is also without merit, and should not prevail.

Ground two of the motion to dismiss or affirm is as follows:

> " In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss said writ of error, and should maintain jurisdiction upon the same, then mover prays that said judgment of said Supreme Court of Oklahoma be affirmed, as it is manifest that said writ of error was taken by plaintiff in error for delay only and that the questions upon which the decision of said cause depends are so frivolous as not to need further argument."

This ground of the motion, like all the preceding grounds, is made upon a general assertion, and in the brief as filed by the defendants in error, the same is not supported by reason or authority, and while a motion to affirm, coupled with a motion to dismiss may, under the rules and decisions of this Honorable Court, be good pleading, yet, we respectfully submit that this ground of the motion, and the argument in support of the same, which argument is made conspicuous by its absence, clearly demonstrates the efforts of the defendants in error to have this court terminate its jurisdiction of this cause without going into the merits of the same.

We further submit that, as shown by the authorities cited *supra*, this case is one wherein the jurisdiction of this Honorable Court has attached, and the plaintiff in error feeling aggrieved at the decisions of the Supreme Court of Oklahoma, and believing that error has been by said court committed to the manifest damage of plaintiff in error, plaintiff in error has, by the method provided by law, brought this cause before this Honorable Court for the purpose of correcting such error, and restoring to plaintiff in error that to which it believes itself rightfully entitled.

Ground three of the motion to dismiss or affirm moves for the vacation of the order of supersedeas, and also moves for the transferring of this cause for hearing to the summary docket.

Insofar as this ground of the motion of the defendants in error seeks to have the order of supersedeas vacated, we respectfully submit that inasmuch as defendants in error succeeded in obtaining possession of the funds involved in this cause, without plaintiff in error being allowed or permitted to supersede that portion of the judgments complained of (pages 57 to 88, both inclusive, of the printed transcript), the matter of supersedeas is of no great importance, and based upon the authority of *Hudgins* v. *Kemp*,

15 L. ed. 511, cited *supra*, the order of supersedeas as found in the printed record probably does not and will not act as a supersedeas in this cause.

However, insofar as this ground of the motion of the defendants in error seeks to have this cause transferred for a hearing to the summary docket, we respectfully submit that this cause is of sufficient importance and of such character as to justify a full presentation to this Honorable Court of the matters involved, in order that the errors, if any, which have been committed, may be corrected, and that a proper judgment, adjudicating the rights of the parties may be rendered, wherefore plaintiff in error prays that said cause be not advanced to the summary docket, but that the same be heard and determined after a full presentation, in the usual course, and that the motion of the defendants in error for an order to dismiss or affirm, be in all things overruled and denied.

Respectfully submitted,

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JESS P. O'MEARA,
Tulsa, Oklahoma;
Attorneys for Plaintiff in Error, Wellsville Oil Company.

No. 541.

In the

Supreme Court of the United States

OCTOBER TERM, 1916.

WELLSVILLE OIL COMPANY, Plaintiff in Error,

vs.

MARTHA MILLER and EVERETT and ALPHA OIL COMPANY, Defendants in Error.

Motion for an Order to Dismiss or Affirm This Cause and in Case of Denial Thereof That the Cause be Advanced to the Summary Docket. Notice of Motion. Brief of Defendants in Error.

Roman J. Brown,

Attorney for Defendants in Error.

In the

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 541.

WELLSVILLE OIL COMPANY, - - Plaintiff in Error,

v.

MARTHA MILLER, nee EVERETT, and ALPHA OIL COMPANY, - - - - Defendants in Error.

Motion for an Order to Dismiss or Affirm This Cause and in Case of Denial Thereof That the Cause be Advanced to the Summary Docket.

Now comes Martha Miller, nee Everett, and the Alpha Oil Company, defendants in error in the above entitled cause, and moves this Court to dis-

miss the writ of error issued upon the petition of the Wellsville Oil Company, the above named plaintiff in error, to the Supreme Court of Oklahoma upon a final judgment entered in said Supreme Court of Oklahoma in favor of the defendants in error and against said plaintiff in error; and in default of dismissing said writ of error, that then in that event this Court affirm the said judgment of the said Supreme Court of Oklahoma; and for cause and grounds for this motion to dismiss or affirm, the defendants in error say:

I.

That this Honorable Court is without jurisdiction to review on writ of error the said judgment of the Supreme Court of the State of Oklahoma for the reasons:

(a) That the Supreme Court of Oklahoma was without jurisdiction to grant the writ of error or to transmit or cause to be transmitted the record in case No. 3785, it having lost jurisdiction of the parties and subject matter when the mandate of the said Supreme Court of the State of Oklahoma was issued to the District Court of Rogers County, Oklahoma, on December 24, 1914, and filed and spread on record in said Court on the same day (printed Record, pp. 56 to 57).

(b) That the Supreme Court of Oklahoma was without jurisdiction to grant the writ of error or to transmit to this Court the record of the final judgment in said case No.

7117, it having lost jurisdiction of the parties and subject matter by the issuance of its mandate to the District Court of Rogers County, Oklahoma, which was filed in said District Court and spread of record therein on the 22nd day of June, 1915.

(c) That the Supreme Court of Oklahoma was without jurisdiction to grant an order of supersedeas or to attempt to approve a supersedeas bond at any time after the expiration of sixty days, Sundays excluded, from the rendition of the judgments complained of.

(d) That there is no Federal question involved.

II.

In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss said writ of error, and should maintain jurisdiction upon the same, then mover prays that said judgment of said Supreme Court of Oklahoma be affirmed, as it is manifest that said writ of error was taken by plaintiff in error for delay only and that the questions upon which the decision of said cause depends are so frivolous as not to need further argument.

III.

In the event that this Honorable Court should refuse to grant the foregoing motion to dismiss or affirm, then mover prays that the order of supersedeas be vacated and that this cause be transferred for hearing to the summary docket. Mover avers that notice of

intention to present this motion was given to and a copy of brief filed in support of same, was served upon plaintiff in error, and that proof thereof accompanies this motion.

IV.

WHEREFORE, Mover prays that said writ of error, taken by the Wellsville Oil Company be dismissed, and in the alternative that the judgment of the Supreme Court of the State of Oklahoma be affirmed, and in the event of the denial of said motion, that the order of supersedeas be vacated, and that this cause be transferred for hearing to the summary docket. And mover shall ever pray.

ROBERT J. BOONE,
Attorney for Defendants in Error.

IN THE SUPREME CORT OF THE UNITED STATES.
OCTOBER TERM, 1916.

Wellsville Oil Company *Plaintiff in Error* v. *Martha Miller, nee Everett, and Alpha Oil Company,* *Defendants in Error.*	No. 541

NOTICE OF MOTION.

To James A. Veasey, L. A. Rowland, and J. P. O'Meara, attorneys for the above named plaintiff in error, Tulsa, Oklahoma:

Please take notice that the foregoing and attached motion will be presented to the said Honorable Supreme Court of the United States at Washington, D. C., on Monday, the 9th day of October, A. D. 1916.

ROBERT J. BOONE,
Attorney for Defendants in Error.
Tulsa, Oklahoma.

Due service is hereby admitted at Tulsa, Oklahoma, this the_____day of September, 1916, of the foregoing notice of motion, motion and brief attached thereto.

Attorneys for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

Wellsville Oil Company,	
Plaintiff in Error	
v.	No. 541
Martha Miller, nee Everett, and	
Alpha Oil Company,	
Defendants in Error.	

BRIEF OF DEFENDANTS IN ERROR.

The questions raised by paragraphs "a" and "b" of the first ground of the motion relate solely to the question of whether or not this Court can acquire jurisdiction upon a writ of error issued and allowed by the Supreme Court of the State of Oklahoma after said Supreme Court of Oklahoma has transmitted its mandates and the same had been spread of record in the trial court. There is offered in evidence in support of these grounds of the motion certified copies of the mandates and of the orders of the trial court ordering them spread of record as well as a portion of the same facts appearing at pages 56 and 57 of the printed record; it will be noted that the judgment in case No. 3785 was rendered by the Supreme Court of Oklahoma on the 22nd day of December, 1914 (page 38 of the printed record). The final judgment in Number 7117 was entered on the 22nd day of June, 1915 (page 95, printed record). The petition of the

plaintiff in error for a writ of error upon both of said judgments was filed in the Supreme Court of Oklahoma on September 14, 1915, a period of more than sixty days excluding Sundays, after the rendition of the judgment in Number 7117, and a period of practically eighteen months after the rendition of the final judgment in Number 3785.

Rules Numbers 10 and 11 of the Supreme Court of Oklahoma provide as follows:

> "X. REHEARING:—STAY OF MANDATE. After the expiration of fifteen days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered. In accordance with the decision of this court and no petition for rehearing shall stay such mandate unless the person applying for rehearing shall present such petition to and obtain from one of the Justices who concurred in the opinion a stay of such mandate until said petition for rehearing shall be heard. The Justice to whom such petition is presented shall examine the same, and if in his opinion, a rehearing will probably be granted, he may take an order staying such mandate.
>
> In any case in which a petition for rehearing is denied or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed, and the clerk shall not file any such motions or applications, except by leave of court first obtained."
>
> "XI. PROCEDURE UPON AFFIRMANCE. Upon the affirming of a judgment, execution may issue, at the option of the party, from this

court; or, if such party elects, a writ of *procedendo* shall be issued to the court below upon the payment by the successful party of the costs incurred in this court."

It will therefore be noted from the above rules that after the expiration of fifteen days from the filing of an opinion in a cause the clerk of the State Supreme Court is required to issue his mandate to the lower court to proceed in accordance with the opinion and decision of the court. The Supreme Court of Oklahoma in construing its right to recall its mandate or to exercise jurisdiction over a case after the mandate has been transmitted to the trial court and spread of record, in the case of *Thomas* v. *Thomas*, 113 Pac. Rep. 1058, says:

> "Where, after a decision of a case, and rendition of an opinion in this court, its mandate is regularly transmitted to the trial court, and is spread of record upon its records, this court, in the absence of fraud, accident, inadvertance or mistake, is without jurisdiction to recall the mandate and entertain a petition for rehearing, and a motion for leave to file the same will be denied."

This court in the case of *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81, 28 Law Ed. 938, held that, "where on an appeal, the Supreme Court of a state reversed a judgment of an inferior court and remanded the cause to that court, with directions to enter judgment, the writ of error

from this court was properly directed to the inferior state court to bring the record here for review.

We, therefore, contend that the writ of error in this case should have been directed to the District Court in Rogers County, Oklahoma, and that although the Supreme Court attempted to transmit a record, such purported record would not give this court jurisdiction.

Under Subdivision (c) that this court is without jurisdiction because the lower court attempted to grant an order of supersedeas after the expiration of sixty days, I am doubtful whether or not the mere fact that the Supreme Court exceeded its authority in granting a supersedeas after the time gave us the right to dismiss the action, or if our remedy would not be to vacate the supersedeas. I am not unmindful of the fact that a Justice of this court might yet grant permission to supersede the judgment of the lower court, but even though this is done, I feel that the original supersedeas order should be set aside, if the entire case is not dismissed as the question might arise, that as to any litigation filed before a valid supersedeas is actually granted, whether it would effect this litigation.

Under Subdivision (d), that there was no Federal question involved in the trial in the lower court, we call attention to the opinion of the court,

pages 39 to 50 printed record. It will be seen that the claim raised by the plaintiff in error in his petition for writ of error, that the Supreme Court failed and refused to give full faith or credit to the decision of the United States Court for the Northern District of the Indian Territory, and that the state court, refused to recognize the decision of the said United States Court of the Indian Territory, and that there was drawn into question the validity of the Statute of the United States of America conferring jurisdiction on said United States Court. The Supreme Court of Oklahoma in its opinion page 44 Printed Record with reference to the jurisdiction of the said United States Court said:

> "Upon thorough investigation of the authority, we seriously doubt the jurisdiction of that court * * * *; however in as much as this court in *Cowles* v. *Lee* 35 Oklahoma 159, has used language that might be interpreted to mean that in the opinion of this court the power of that court to make an order was in Chancery as well as in Probate, we will assume for the purpose of this case that the court had the jurisdiction contended for by the plaintiff in such case properly brought before it."

The decision of the trial court and also the Supreme Court of Oklahoma was based upon the fact that the plaintiff in error did not come into court with clean hands, and for that reason was

properly denied relief in the trial court. (Text of opinion page 44 Printed Record.) Quoting further from the text of opinion of the Supreme Court of Oklahoma as to what was the question tried before the court, we refer to page 47 of the Printed Record wherein the lower court says:

> "The record shows that the plaintiff not only came into court with unclean hands but had been guilty of iniquity, and the trial court properly denied it relief."

And quoting further from the said opinion as to the question tried in the court below page 51 of the Printed Record says:

> "We therefore, conclude that demurrer was well taken to the first cause of action on the ground that the facts set out were not sufficient to justify the chancellor in granting equitable relief, in as much as the plaintiff did not come into court with clean hands and had failed to comply with a condition precedent upon which the lease was authorized, namely, had not secured the approval of the Secretary of the Interior. We are equally certain that the demurrer was good as to the second cause of action in which the claim was made for compensation for expenses in operating the lease and for improvements placed on the premises. The plaintiff is in possession. It invokes the jurisdiction of equity to have the lease under which it is claiming declared valid and the lease of the Alpha Oil Company declared invalid. It may be that the plaintiff

in error should not be dispossessed without being compensated in a manner and as it claims it should be, but that cannot be done in this suit. The facts alleged in the two counts were not sufficient to justify the court in granting the relief prayed for, or in fact any relief. The trial court was right in sustaining the demurrer. We recommend that the exception be overruled and that the judgment appealed from be affirmed, and that the former opinion filed herein be withdrawn and this substituted therefor, and that a rehearing be denied."

That opinion refers to the appeal in case Number 3785, the opinion filed on the second appeal in case Number 7117, will be found on page 101 to 103 of the Printed Record, and involved the question of whether or not, the trial court erred to the prejudice of the plaintiff in ordering, under the mandate issued by the Supreme Court, the disposition of the money collected. It will therefore be clearly seen from the opinions that the questions decided by the Oklahoma Supreme Court were (1) that the plaintiff could not recover because he did not come into court with clean hands and failed to comply with a condition precedent upon which the lease was authorized, namely the approval of the Secretary of the Interior (2) As to the right of the plaintiff to recover compensation for expenses in operating the lease and for improvements placed on the premises and (3) Whether or not the

lower court made proper disposition of the moneys in its hand arising from the litigation.

Now if counsel can point to any Federal question in either of these three questions I am at a loss to know where he will find it.

It is fundamental that the Federal question must be real, not fictitious; that is there must be some ground for the averment of the question. *Hamblin* v. *Western Land Company* 147 U. S. 531, 37 Law Ed. 267.

In the early case of *Murdock* v. *Memphis* 20 Wallace, 635, 22 Law Ed. 429, Justice Miller says in the opinion:

> 1. "That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the Act must have been raised and presented to the State Court.
>
> 2. "That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree, rendered in the case.
>
> 3. "That the decision must have been against the right claimed or asserted by the plaintiff in error under the Constitution, treaties, laws or authority of the United States.
>
> 4. "If it finds that it was rightly decided, the judgment must be affirmed.
>
> 5. "If it was erroneously decided against a plaintiff in error, then this court must further

inquire whether there is any other matter or issue adjudged by the State Court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed inquiring into the soundness of the decisions on such other matters at issue."

It will be noted that it is only in the case of the State Court's decision being adverse to the power exercised by the United States that a review by the Supreme Court is provided for. In the case at bar decisions have not been adverse to the power exercised by the United States, but will be readily seen from the opinion of the court, that the Supreme Court recognized the authority of the United States Court in the Indian Territory and further that it sanctioned the approval of the Secretary of the Interior on the lease to the defendants in error, therefore it seems clear that there is no federal question involved in either of the decisions herein before referred to.

It seems so manifest from the question determined by the decisions of the court that the writ of error in this cause was taken by the plaintiff in error for delay only, and that the question upon which such decisions of said cause depend, are so frivolous as not to need further argument.

We therefore respectfully submit and request

that the writ of error be dismissed and if not that, then that the judgment be affirmed, and failing therein, we move that the supersedeas be vacated and the cause be advanced to the summary docket for an early hearing.

ROBERT J. BOONE,
Attorney for Defendants in Error.

Tulsa, Oklahoma.